

VOL.XIV

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-vs-

10-CR-219S

TONAWANDA COKE CORPORATION
MARK L. KAMHOLZ,

Defendants.

Proceedings held before the

Honorable William M. Skretny, U.S.

Courthouse, 2 Niagara Circle, Buffalo,

New York on March 18, 2013.

APPEARANCES:

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U.S. Department of Justice,
Appearing for the United States.

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Appearing for Tonawanda Coke Corporation.

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Appearing for Mark L. Kamholz.

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1 (Jury not present in the courtroom.)

2 THE CLERK: Criminal case 10-219S, United
3 States of America versus Tonawanda Coke and Mark
4 Kamholz.

5 THE COURT: Okay. The attorneys and
6 parties are back present, and we're about to
7 resume. The jury, I understand, is here.

8 Are there any preliminary issues that have to
9 be addressed?

10 MR. LINSIN: Your Honor, I believe there
11 are -- there is at least one and perhaps possibly a
12 second. The one issue that I think would be very
13 helpful to resolve before we begin -- before we get
14 going, if possible, this is the issue of the
15 summary charts. As I understand it, the
16 government's next witness will actually be an
17 expert witness on RCRA issues, so perhaps we may
18 not bump into it immediately. But, as we discussed
19 on Friday, we did order and have received the
20 transcript of the testimony of Mr. Cahill on these
21 issues.

22 For reasons we're prepared to explain when we
23 get to the issue, regrettably we've not been able
24 to come to an agreement with the government even as
25 to the -- the simpler summary chart regarding the

1 by-products logbook itself.

2 So, that would be the one issue, and the second
3 issue, your Honor, that at some point we would like
4 to address with the Court is just witness
5 management, case management for this week in terms
6 of our defense case, and we have some suggestions
7 in that regard as well.

8 THE COURT: Okay. All right. So the
9 arguments are as they were then on Friday with
10 respect to the summary charts?

11 MR. LINSIN: Well --

12 THE COURT: There's nothing new, is what
13 we're really saying, based on your examination of
14 the transcripts?

15 MR. LINSIN: We -- we have looked closely
16 at the transcript, your Honor. I have copies of
17 the transcript for the Court and for the government
18 if they don't have already it. We have marked the
19 sections -- every section we could find in
20 Mr. Cahill's testimony where he addressed this
21 issue of the adjustments to the back pressure --
22 I'm sorry -- to the set point for the
23 pressure-relief valve.

24 We have also looked a little more closely at
25 the logbook itself overall, and, candidly, it is

1 that examination that has resulted in our inability
2 to -- to come to some agreement with the government
3 even on that basis. And we do believe, your Honor,
4 if you will hear us on that, that there are some
5 significant issues there that relate directly to
6 the underlying question of the reliability of this
7 data.

8 THE COURT: Okay. Mr. Mango.

9 MR. MANGO: Yes, your Honor. I have had
10 an opportunity to review Mr. Cahill's transcript,
11 and I have a much different reading than I
12 believe -- I haven't heard it being articulated
13 yet, but I have a much different reading of what
14 this transcript means. And in -- my reading of
15 this transcript indicates that during direct
16 examination Mr. Cahill was asked specifically about
17 did you -- this is now I'm reading from page 50.
18 I've tabbed and highlighted a couple of sections as
19 well, so at least I'll give the Court those
20 references. On page 50 he's asked, "Did you ever
21 give instructions to anyone to raise or lower the
22 bleeder?"

23 "Yes."

24 "Okay. If you had given that instruction and
25 if someone had, in fact, raised or lowered the

1 bleeder, would you expect to find that notation in
2 the logbooks, the by-products logbooks?"

3 Answer: "Yes, I would."

4 That's his first day of testimony. The second
5 day of testimony he resumed on direct, and I asked
6 him very -- I got into questions about that again.
7 And now I'm reading from page 12 of the second day.

8 "Okay. Who is permitted to adjust the release
9 point for the bleeder?"

10 Answer: "The BP supervisor and the operators."

11 Question: "If an adjustment is made, is that
12 noted anywhere?"

13 "Yes."

14 "Okay. Where is the adjustment noted?"

15 "It would be noted in the BP logbook."

16 I then went on to ask Mr. Cahill on direct
17 about the notations for the April inspection. I
18 showed him April 14th, April 15th, 16th, and asked
19 him after each of those is there any notation he
20 made a change in the logbook. And he said, no,
21 because he didn't want anybody to find out.

22 Then I grouped April 17th, the 20th, and the
23 21st all into one question. He said again there's
24 no notation. That was the extent of the direct
25 examination on that.

1 Now, during cross, Mr. Cahill was asked a
2 couple of questions about -- about the -- the --
3 this is now I'm reading from page 52 during
4 Mr. Personius's cross.

5 Question: "Do you agree" -- and this is on to
6 53 -- "Do you agree, Mr. Cahill, that while it
7 might have been the desired practice to put changes
8 in the pressure for the PRV recorder in the" --
9 hyphen hyphen -- "in the by-products logbook, that
10 didn't happen on a regular basis?"

11 Answer: "No, it didn't happen on a regular
12 basis."

13 Question --

14 THE COURT: Read that question again,
15 please.

16 MR. MANGO: I've an interpretation of
17 that. It's, "Do you agree, Mr. Cahill, that while
18 it might have been the desired practice to put
19 changes in the pressure for the PRV recorder in
20 the" -- hyphen hyphen -- "in the by-products
21 logbook, that that didn't happen on a regular
22 basis?"

23 Answer: "No, it didn't happen on a regular
24 basis."

25 He's then asked, "It is rare that entries were

1 made in this logbook, isn't it?"

2 And he says: "No. Whenever the operators
3 would make an adjustment, they would definitely put
4 it in the logbook."

5 Question: "They would?"

6 Answer: "Yes."

7 And then later in the page down at the bottom
8 of 53, Question: "Right. But you're saying most
9 of the time it gets changed, the majority of times
10 that pressure got changed it should be in the
11 logbook and will be?"

12 And he says "Yeah."

13 Now, my interpretation, your Honor, is he
14 clarified that. My understanding is from other
15 witnesses and Mr. Cahill -- I don't think
16 Mr. Cahill got into it directly how often this got
17 changed, but other witnesses have, and said this
18 doesn't get changed all that frequently. So I
19 think that first question where he answered that, I
20 think he was bringing that -- that practice into
21 play in answering the question. And then later
22 when he was asked more directed questions, he
23 answers, well, no, it should be in the book.

24 Now, then there is a question by Mr. Personius
25 about whoever makes the change in the recorder is

1 expected to walk to this green shack, which is
2 75 feet. Mr. Cahill says, "Yes, that's what you're
3 supposed to do."

4 And then there was the break. Mr. Personius
5 was right. There was a break, and then after the
6 break, after having read that book that he was
7 shown, which included the April inspection, he's
8 asked, "And I think you told us on direct that when
9 you would change the pressure you did not make an
10 entry in the logbook, is that true?"

11 "That's true, yes --"

12 All he said on direct was for the April
13 inspection. So I think in reading everything into
14 context, we have a much different view of
15 Mr. Cahill's testimony. And I --

16 THE COURT: Than Mr. Linsin's view as
17 opposed.

18 MR. MANGO: Right.

19 THE COURT: But it's consistent with what
20 you argued on Friday.

21 MR. MANGO: Yes, your Honor. In terms of
22 the -- we have made some changes to the by-products
23 operator exhibit, Exhibit 200, based on comments by
24 counsel. We haven't incorporated wholesale all of
25 their comments, because it would defeat the purpose

1 of a concise, consolidated summary exhibit. But we
2 have added where we can descriptions in the comment
3 section to reflect requests that they have made.

4 THE COURT: This is Exhibit 200?

5 MR. MANGO: Exhibit 200, your Honor. And
6 I think it does -- that's what the testimony is
7 for -- fairly and accurately reflect what is
8 supposed to be reflected in that chart.

9 THE COURT: Okay. Thank you, Mr. Mango.
10 Mr. Linsin.

11 MR. LINSIN: Your Honor, and I would be
12 happy to offer up a copy of the pages I'm
13 referencing if the Court would wish, but part of
14 the problem with Mr. Mango's comments is that the
15 portions of Mr. Cahill's testimony that he read
16 from Mr. Cahill's direct examination do not
17 encompass all of his testimony regarding his
18 setting of this set point for the pressure-relief
19 valve. And I will give you an example.

20 On page 24 of his testimony, the first day of
21 his testimony, he's asked a question by Mr. Mango:
22 "All right. As part of your responsibilities as
23 by-products foreman, did you have any
24 responsibilities relating to the operation of this
25 bleeder valve?"

1 "Yes."

2 Question: "What were your responsibilities?"

3 Answer: "To maintain the pressure in the
4 plant."

5 Question: "All right. What were your
6 responsibilities with respect to this bleeder
7 valve?"

8 Answer: "Setting it."

9 Question: "Setting it?"

10 Answer: "Yes."

11 "Okay" -- this is the question. "Okay. So
12 there's a way to set it?"

13 The answer is "Yes," and then the conversation
14 goes on.

15 It is clear from this testimony, your Honor,
16 that Mr. Cahill also testified on direct that part
17 of his responsibilities as BP foreman, in order to
18 coordinate and maintain plant pressure, was to set
19 this valve. And there is a significant part of
20 this equation, your Honor, that is -- the closest
21 equivalent I can think of is to the dog that didn't
22 bark, that if you look at this back pressure
23 logbook, there are not entries by Mr. Cahill
24 indicating he has changed the set point on this
25 pressure-relief valve.

1 The testimony and Mr. Cahill's -- the passages
2 from his testimony that Mr. Mango was just
3 referencing was, and we believe consistent, that it
4 is the operators that were required to record it
5 when they did so.

6 But we believe that the testimony we just
7 referenced about his ongoing general duties as
8 foreman of the by-products department were to
9 maintain this pressure, and then when you add that
10 to the question and answer regarding whether he
11 ever made an entry in the logbook reflecting a
12 change in the set point, coupled with the absence
13 of any such entries in the logbook, I think
14 demonstrate that it is clear that as foreman of
15 that department he was not recording his actions in
16 the logbook. He wanted to make certain that the
17 operators were.

18 And that is consistent with the structure of
19 the logbook, that these entries regarding changes
20 in the set point that are in the logbook always
21 have an operator number associated with them.
22 Mr. Cahill is not an operator. He is the foreman.

23 And so the government is cherry-picking some of
24 this testimony, we believe. But I think, your
25 Honor, this issue of the other entries that we've

1 been unable to come to some agreement about I also
2 think reflect very significantly on the reliability
3 of this data. And if I could offer just one
4 example, your Honor.

5 I don't know why the government has not offered
6 a summary chart of April 2009. As we see the
7 submission they are proposing, there is no summary
8 chart for that month in April. However, there are,
9 if you look at the logbook, a number of entries in
10 April clearly demonstrating that the set point in
11 that month was changed and that there were
12 adjustments to the bleeder valve because of an
13 operation in pumping down the moat, and yet these
14 are not entries they are prepared to enter into
15 even their summary chart for the logbook.

16 But then when they jump to May and seek to
17 reflect the set point for the pressure-relief valve
18 in their May summary, they go all the way back to
19 March and ignore these entries that are directly in
20 the logbook demonstrating that there had been
21 adjustments up and down in the set point.

22 THE COURT: In April, you mean?

23 MR. LINSIN: Yes, sir. Yes, sir.

24 There are other entries here which demonstrate,
25 again in '09, that the -- the bleeder valve itself

1 appears not to be working. There's an entry, again
2 one they're not willing to include, that the valve
3 was closed on the bleeder manometer, which is the
4 measuring device for the pressure. This is --
5 excuse me -- in May, on May the 7th. And then
6 there's a May 22nd entry indicating bleeder back in
7 service.

8 It appears to be, your Honor, from these
9 entries, that just on the face, that the bleeder
10 valve itself may well have been out of service for
11 a two-week period of time.

12 And we -- all of these entries that we had
13 requested be included in this first summary chart
14 are reflective, we believe, of functions and
15 changes to the set point, sometimes references to
16 changes in set point without any indication as to
17 what the change is. And the government is
18 unwilling to include it in their first summary
19 chart because -- we suspect because they believe or
20 recognize that it will undermine the reliability
21 they are seeking to achieve by just extracting
22 selected numbers for the second summary chart.

23 THE COURT: All right. Why no April?

24 MR. MANGO: Your Honor, there is a good
25 reason for that, and that's absolutely not the case

1 is that we're trying preserve the integrity of this
2 chart by excluding April. April was excluded
3 because there's no bleeder circular charts for
4 April except for during the inspection. And we now
5 know that -- according to testimony, that the
6 bleeder set point was changed.

7 THE COURT: By Cahill.

8 MR. MANGO: By Cahill. And it wasn't
9 recorded anywhere. So, if we actually included
10 April, we would be making assumptions and
11 including -- and would have summary charts that
12 would be the product of guesswork, because there
13 was no notation as to what it was exactly set to.

14 Now, the other entries that are in April that
15 Mr. Linsin references, there's an April 2nd, an
16 April 4th, and an April 5th, '09. First off, April
17 is not included, so -- in the bleeder circular
18 charts, so there was really no purpose in including
19 it in the by-products operator summary.

20 But these entries have nothing to do with the
21 bleeder, the bleeder we're talking about. The fact
22 that it says, "Pumping down moat. Have bleeder
23 opened a little," that has -- that is totally
24 unrelated to the by-products pressure-relief valve.
25 There is a bleeder that is associated with the --

1 the steam apparatus used to pump down the moat.
2 We've confirmed this with Tonawanda Coke employees.
3 I mean, so there was a reason that Special Agent
4 Conway did not include these on his chart.

5 THE COURT: This moat isn't the bleeder
6 we're talking about.

7 MR. MANGO: Right. And likewise the fact
8 that the bleeder manometer valve gets closed, we've
9 also confirmed that with Tonawanda Coke employees
10 who actually worked on this, that said whenever
11 pressure would really get high, I mean on days it
12 was really going up, the bleeder -- the manometer
13 would get stuck. It would get basically maxed out
14 and get stuck there.

15 THE COURT: That's not part of the
16 evidence.

17 MR. MANGO: Right. But this is something
18 that went into the creation of this chart. And
19 so -- in Mr. Conway's creation of the chart. So
20 the fact that there's this entry that says, well,
21 it could have been out of service, Mr. Conway
22 believes it wasn't out of service, based on his
23 information in creating this summary.

24 So it is a fair representation of what is in
25 the logbook.

1 THE COURT: Well, he doesn't believe that
2 it was out of service, and what's the basis for
3 that evidentiarywise?

4 MR. MANGO: It is based on conversations
5 he's had with Tonawanda Coke employees in
6 investigating the entries in the by-products
7 operator logbook.

8 THE COURT: Yeah, but that's outside the
9 record, right?

10 MR. MANGO: It is. It is. But if it's
11 examined on cross-examination, I mean, he'll be
12 ready to discuss that. I was not going --

13 THE COURT: He has a good-faith basis for
14 the exclusion of April.

15 MR. MANGO: Right. Right. So --

16 MR. LINSIN: Your Honor, the entry
17 Mr. Mango is referring to says, "Bleeder back in
18 service." This is May 22nd.

19 THE COURT: 22nd?

20 MR. LINSIN: Yes. It is not a maybe. It
21 is not a could-have-been. And what now -- what
22 Mr. Mango is now suggesting is that his very
23 witness is suggesting that the entries in this
24 logbook they're seeking to summarize are false.

25 And I just find this to be -- if -- if the

1 purpose of this testimony is then to impugn the
2 integrity of the very logbook they're seeking to
3 summarize, I think they are shooting themselves in
4 the foot.

5 I just -- the fundamental point here, your
6 Honor -- and I do believe these issues regarding
7 the other entries in the logbook are significant,
8 but the fundamental point, as we stressed in our
9 discussions on Friday, the man who was the BP
10 foreman testified, and we believe unambiguously,
11 that he changed this set point as part of his
12 general responsibilities as the BP foreman. That
13 was his direct testimony.

14 And when he was asked on cross, not just about
15 April of '09, about all of his direct, about
16 whether he put entries in the logbook, he said no.
17 And that's exactly where this record is. And --
18 and the logbook itself corroborates the
19 interpretation that we have of this testimony,
20 because there simply are not -- it's not just April
21 that's missing any entries from Mr. Cahill. There
22 are none for Mr. Cahill except when he is
23 admonishing, as I referenced to the Court on
24 Friday, he -- there is an entry later in 2009 when
25 he's admonishing the operators not to change it

1 without his direction.

2 And there is another entry, your Honor, I would
3 point out, in July of 2009 where the -- an
4 operator, Operator JC. We're not certain -- well,
5 we think we know who that is, but essentially is
6 requesting Mr. Cahill in this note to say, please
7 advise us when you change the -- I'm interpreting
8 here -- please advise the operators when you change
9 the set point. We don't have radios or phones, and
10 you need to tell us.

11 And we believe that further corroborates the --
12 what is the testimony, what is the evidence by the
13 log itself, that Mr. Cahill, as foreman, was not
14 noting his changes in this logbook.

15 MR. MANGO: Your Honor, the last point on
16 that is, there is an entry on October 1st of 2008
17 by Pat Cahill. It's not on here because it doesn't
18 relate to a set point. But it does say, "Cahill
19 working on bleeder, not bleeding correctly." He
20 puts that in the logbook.

21 There's other entries in here which are
22 recorded on the operator logbook summary. "Bleeder
23 set at 95 per PC." So he has the responsibility to
24 make settings in the bleeder. He tells his
25 operators to do that. They then put it on here.

1 There's a least two of those on this chart.

2 "Bleeder set at 95 per PC." That's on the first
3 entry November 3rd of 2006. Then there's an entry
4 on December 19th of 2007, "Bleeder now at 100 as
5 per PC."

6 There's no discrepancy in what he testified to
7 in this logbook.

8 MR. PERSONIUS: Judge, those entries that
9 Mr. Mango refers to, I don't interpret those as an
10 indication that it was Mr. Cahill that did that.
11 It simply is saying it was per or as per
12 Mr. Cahill; in other words, in accordance with his
13 direction.

14 I only want to add one point, Judge. The
15 fairest reading from the government's perspective,
16 the best they can argue from his trial testimony is
17 that what he testified to is that entries would be
18 made in the -- the BP logbook when it was the
19 operator making those changes, but if it was
20 Mr. Cahill doing it, and it was his responsibility
21 to do it, he would not note those entries in the
22 logbook.

23 So all the changes that were made by
24 Mr. Cahill, we don't know about those, and that is
25 corroborated by the entry of July of 2009 where

1 someone is complaining about the fact that
2 Mr. Cahill makes changes and doesn't tell anybody
3 that's he's doing it.

4 THE COURT: Okay. Why don't you give me
5 the highlighted portions of your respective
6 transcripts, and I'll take a look at those. I'll
7 make a decision before we get started.

8 Who is your first witness?

9 MR. MANGO: James Strickland, your Honor.

10 THE COURT: Okay. The charts won't be
11 admitted through him.

12 MR. MANGO: No, your Honor.

13 THE COURT: We'll wait for Conway for
14 that?

15 MR. MANGO: Yes, your Honor.

16 THE COURT: Okay.

17 MR. MANGO: Your Honor, there is one other
18 issue. We'll just give the Court some notice, and
19 it depends on how -- I believe there's going to be
20 a request regarding witness order. It's come to
21 our attention one of the defense experts, Marcia
22 Williams, her testimony, which was noticed as being
23 substantially similar to what she was going to
24 testify here in this case, in a Southern Union case
25 that was out of Rhode Island, a recent RCRA case,

1 the government moved to preclude her testimony in
2 that case, and the court held a Daubert hearing
3 where she testified, and then ultimately did
4 preclude her testimony at trial.

5 The government intends to file a motion to
6 preclude her testimony on similar grounds. It
7 was -- the basis of that is that she was providing
8 essentially legal opinions, which would invade on
9 the province of the Court. We'll reduce that to
10 writing and ensure something gets filed today.

11 THE COURT: Okay. Anything, Mr. Linsin?

12 MR. LINSIN: Well, your Honor, we are
13 proffering Miss Williams to testify precisely as we
14 noticed in our notice. I don't know why this
15 revelation is coming now this late in the day, and
16 I would simply proffer to the Court that
17 Miss Williams' proposed testimony would be in
18 general character and similar to the other expert
19 witness testimony that has been admitted without
20 objection here in this trial.

21 So, I mean, if the government files something,
22 we will respond, but Miss Williams has been
23 instructed about the limitations given the Court's
24 determination on the two regulatory definitions,
25 and her testimony will -- will closely adhere to

1 that limitation.

2 THE COURT: Okay. I'll wait for whatever
3 it is that you file in your response in that
4 regard.

5 Okay. We'll take a look at this.

6 Okay. We'll see you as soon as I can get back.

7 MR. LINSIN: All right. Thank you, your
8 Honor.

9 (Short recess was taken.)

10 (Jury not present in the courtroom.)

11 MR. LINSIN: My apology, your Honor.

12 THE COURT: No problem, Mr. Linsin. Thank
13 you.

14 Okay. The attorneys and parties are back
15 present. And with respect to the summary charts
16 proffered by the government, I reviewed the
17 arguments of counsel, that is the attorneys,
18 concerning the government's proffered summary
19 charts. I incorporate the discussion we had on
20 this topic on Friday, March 15th, 2013, as well as
21 the discussion this morning. I have had a chance
22 to adequately review the transcripts of Pat
23 Cahill's testimony that were handed up to me this
24 morning.

25 And based on that review and on my own

1 recollection of the testimony, and giving full
2 consideration to the totality, I am going to permit
3 the government to use its summary charts over the
4 defendants' objections. I'm satisfied that the
5 government has a good-faith basis for the
6 information contained in the chart and that the
7 trial testimony adequately supports the
8 government's summaries for admissibility purposes.

9 Defendants undoubtedly interpret the trial
10 testimony differently than the government, but I
11 cannot conclude at this time that the government
12 lacks an evidentiary basis for its summary charts.
13 I will therefore permit them.

14 With there being an evidentiary basis for the
15 summary charts, I find that defendants' objections
16 concerning the reliability of the summary charts go
17 to the weight to be afforded the charts rather than
18 to admissibility. Defendants will have the full
19 opportunity to cross-examine Agent Conway on the
20 methodology and information he employed to create
21 the charts, as well as any relevant information he
22 may have omitted from them. It will be then for
23 the jury to afford the charts and the information
24 therein whatever weight, if any, it deems
25 warranted.

1 Consequently, the defendants' objections to the
2 government's summary charts are overruled.

3 MR. PERSONIUS: Your Honor, may I, on
4 behalf of the defense, make a request in that
5 regard, that as part of -- I think really it would
6 be pursuant to -- I don't know if it's Rule 3500 or
7 what it would be, but to the extent that Agent
8 Conway has notes of these interviews that he
9 conducted with Tonawanda Coke employees, may we
10 have a copy of those notes for cross-examination?

11 THE COURT: Yes.

12 You will make inquiry in terms of what exists
13 in that regard, Mr. Mango?

14 MR. MANGO: Yes, your Honor. I know some
15 of the -- the basis will have included a
16 conversation that was had this morning. So we'll
17 see if we can have that reduced to a note form if
18 there was no notes taken. I was in one location,
19 Agent Conway was in a different location, and then
20 there was a witness on the phone. So I'll inquire
21 and make sure that's produced if there is notes.

22 THE COURT: Okay. Mr. Linsin?

23 MR. LINSIN: I know this is not
24 determinative to the Court's ruling. I'm not
25 asking for any further reconsideration. I just

1 want the record to be clear on one point with
2 respect to an issue I raised in our discussion on
3 Friday.

4 The Court may recall that I made reference to
5 statements by one of the BP operators, Mr. Jack
6 Bodie. And I stated which -- what I believe to be
7 true on Friday, that Mr. Bodie had informed the
8 government in its interview reports that he at
9 times -- he was a BP operator -- he at times
10 changed the set point without recording it. I was
11 mistaken in that representation. I just want to
12 make it clear. Mr. Bodie did, in fact, say that,
13 but he said it to us in an interview that we
14 conducted with him. We reviewed the interview
15 reports that the government had in its possession,
16 and to the extent I was suggesting they had
17 information in their possession that was contrary
18 to the position, I just wanted the record to be
19 clear. All right. Thank you, your Honor.

20 THE COURT: Okay. The record will so
21 reflect.

22 We're almost ready. I'd like to have the
23 attorneys come up to the bench for a moment,
24 please.

25 (Side bar discussion held on the record.)

1 THE COURT: Okay. Can everybody hear me
2 okay? I did receive a letter that apparently was
3 sent to defense counsel from James Kennedy, the
4 First Assistant United States Attorney. And the
5 copy I have references a statement that apparently
6 I made with respect to Assistant U.S. Attorney
7 Mango. What I want to clarify at this point in
8 time -- and nobody raised this as any type of
9 issue. One, I have said a number of times that
10 counsel for both sides were doing an excellent job.
11 And, frankly, I have no bias one way or another
12 with respect to this case and the performance
13 and/or conduct of the attorneys.

14 In my view what I did say specifically with
15 respect to Mr. Mango is not accurately reflected in
16 the letter. My recollection is that I said that
17 his performance was -- well, the letter reads this
18 way. It reads that he's one of the best attorneys
19 that I have seen in the courtroom. Whether that's
20 true or not, my recollection is that I said that
21 it's one of the better performances that I've seen
22 from the United States Attorney's Office in a
23 while. So I qualified it a little bit. I don't
24 want this to go your head, Mr. Mango.

25 MR. MANGO: No, it surely is not.

1 THE COURT: But my comments always with
2 respect to counsel, you all are cooperative. You
3 are -- I mean, to me, I mean, I can't imagine
4 clients either way having better representation. I
5 mean that sincerely.

6 And the letter is what it is, but, I mean, I
7 just want you to know that from my standpoint
8 there's no favoritism whatsoever, nothing in my
9 mind that distinguishes one side or the other in
10 terms of how I view this case. And I consistently
11 maintain I'm simply an umpire and managing the
12 trial as best as I can, and I favor no side over
13 any others. And if there's anything you want me to
14 do, any further discussions that you want to have,
15 I'll be more than happy to do it.

16 MR. LINSIN: Your Honor, can I represent
17 to the Court and to the government that we received
18 a copy of this letter on Friday. We spoke about it
19 among the defense team. I spoke to Mr. Personius
20 about it as well. We were in no way troubled by
21 the reported conversation. We intended -- instead
22 of just responding by email, we intended to draft a
23 letter confirming that view to the First Assistant
24 United States Attorney. And we will do so. But I
25 can represent to the Court that we are -- we have

1 no concerns or issue with the conversation either
2 as reported in the letter or as recalled by the
3 Court. So we appreciate your -- your raising this
4 on the record, but we will confirm in writing what
5 I have just recited orally.

6 THE COURT: Okay. Well, I appreciate
7 knowing that. Well, rather than expound on it,
8 I'll leave it for what it is. And I guess we're
9 ready to proceed then.

10 MR. LINSIN: All right.

11 MR. PERSONIUS: Judge, I just want to add
12 the letter is drafted, and the letter makes it
13 clear this is a non-issue. It is not a problem.

14 THE COURT: Okay. I mean --

15 MR. PERSONIUS: It's just not.

16 THE COURT: -- frankly, I guess you learn
17 something all the time. And, you know, the fact
18 that I say counsel in a case are doing a great job
19 for their clients, you know, I'll have to give that
20 thought down the road a little bit. But in this
21 case I feel it's appropriate, so -- on both sides.
22 So thank you very much. I appreciate it.

23 MR. LINSIN: Thank you, Judge.

24 MR. MANGO: Thank you, Judge.

25 (End of side bar discussion.)

1 THE COURT: Okay. Chris, I think we're
2 ready if the jury would like to come out. Please
3 give them that invitation, please.

4 COURT SECURITY OFFICER: Okay.

5 (Jury seated.)

6 THE COURT: Actually, we couldn't find the
7 notebooks, and that's why we're late. No, that's
8 not why.

9 Okay. Welcome back. I hope everybody had a
10 good weekend, a nice weekend. We're happy to have
11 you back. Thank you. Sorry for the delay. I know
12 we had you come in a little bit later, and things
13 took a little bit longer, and we had some issues
14 that we had to resolve here. So I think we're
15 ready to go. We'll distribute the notebooks now.

16 Please keep in mind that we urge you to keep
17 your minds open until all of the evidence is in,
18 respecting the fact that the burden of proof is on
19 the government beyond a reasonable doubt and that
20 the defendants are presumed innocent in this case.

21 So please have a seat. Thank you.

22 Okay. We have, I think, everybody assembled,
23 and, of course, I think by now you know everybody.
24 This is United States versus Tonawanda Coke
25 Corporation and the defendant Mark Kamholz, who's

1 at the table with defense lawyer Rod Personius.

2 And Gregory Linsin and Jeanne Grasso and Ariel

3 Glasner represent the Tonawanda Coke Corporation.

4 And they are here along with Sheila Henderson, who

5 is the paralegal that does a lot of the technology

6 work for the defense and for the government.

7 Robert Conway is the agent who's at the far table

8 with Lauren DiFillipo, the paralegal. And the

9 attorneys you've come to know, too, are Aaron Mango

10 and Rocky Piaggione. And I think the only person I

11 missed was Paul Saffrin, who is the president of

12 Tonawanda Coke. So that gives you the full

13 landscape once again.

14 It's good to have you back. It's nice to start

15 a Monday seeing our jury. And we hope the

16 government can proceed with its case.

17 Mr. Mango, are you ready with your next

18 witness?

19 MR. MANGO: We are, your Honor. Thank

20 you. The government would call James Strickland.

21 THE COURT: If you would approach the

22 witness stand, please, and I'll tell you when to

23 stop, and it should be right there, and then we'll

24 ask -- yeah. Terrific. Face the jury. That's a

25 good thing.

1 J A M E S G. S T R I C K L A N D, having been
2 duly sworn as a witness, testified as follows:

3 THE COURT: Okay. Mr. Witness, still good
4 morning. Good morning.

5 THE WITNESS: Good morning, your Honor.

6 THE COURT: A couple of preliminary
7 instructions. It is important that you keep in
8 mind you're testifying for the benefit of the
9 ladies and gentlemen of the jury. And we ask you
10 to try to be concise with your answers. Speak at a
11 conversational tone. The microphone is friendly,
12 so it should pick you up if you speak at it. You
13 have to get a little bit closer than you are right
14 now or bring it towards you.

15 If you don't understand a question, please
16 don't answer it. Just ask the lawyers or me to
17 repeat the question until we get it clear. If you
18 can answer it in a yes or no fashion, that usually
19 helps, because whenever you volunteer information
20 that complicates things, usually. Sometimes -- and
21 then more often than not the lawyers will follow up
22 with proper questions to get the information that
23 they need from you.

24 If there's an objection, wait until I rule on
25 the objection, and then I'll give you instructions

1 on whether to complete an answer, start your answer
2 again, wait for another question, or instructions
3 like that.

4 Do you understand?

5 THE WITNESS: I do.

6 THE COURT: Okay. I think you're going to
7 carry okay, but for us state your full name, spell
8 your last name, please.

9 THE WITNESS: My name is James G.
10 Strickland. Last name is spelled
11 S-T-R-I-C-K-L-A-N-D.

12 THE COURT: Okay. Mr. Mango, your
13 witness.

14 MR. MANGO: Thank you, your Honor.

15 DIRECT EXAMINATION BY MR. MANGO:

16 Q. Good morning, Mr. Strickland. How are you?

17 A. Good morning. Very well.

18 Q. Are you currently employed?

19 A. Yes, I am.

20 Q. Can you tell the jury, please, who you're
21 employed by?

22 A. I'm employed by the New York State Department
23 or Environmental Conservation, Region 9 office in
24 Buffalo.

25 Q. And what is your current position with the

1 Region 9 office in Buffalo?

2 A. Currently I am the regional engineer in the
3 Region 9 office.

4 Q. And can you tell the jury what the regional
5 engineer does?

6 A. As regional engineer I oversee all of our
7 environmental quality programs, which include our
8 air program, water program, solid waste program,
9 hazardous waste program, and environmental
10 remediation program.

11 Q. Okay. So you oversee all of those different
12 programs?

13 A. Yes.

14 Q. Which would include the hazardous waste program
15 you mentioned?

16 A. Yes.

17 Q. And even the air program?

18 A. Yes.

19 Q. All right. How long have you been the regional
20 engineer?

21 A. About two and a half years.

22 Q. Mr. Strickland, who do you report to, if
23 anybody, in Region 9?

24 A. I report to the regional director.

25 Q. Okay. So can you tell the jury how long in

1 total you've been employed with the DEC?

2 A. I've been with the DEC approximately 30 years.

3 Q. And I'd like you to tell the jury what other
4 positions you've held with the DEC and
5 approximately how long you held those positions.

6 A. Prior to being the regional engineer, I was the
7 regional hazardous materials engineer for
8 approximately 16 years. Prior to that I worked in
9 our Region 4 office in Schenectady for about a year
10 as a solid waste engineer. And for approximately
11 the 12 years prior to that I worked in our
12 wastewater treatment construction grants program as
13 an engineer.

14 Q. And so you mentioned as the Region 9 hazardous
15 material engineer you served in that role from 1994
16 to 2010, is that correct?

17 A. That's correct.

18 Q. All right. That's the 16 years you mentioned?

19 A. Yes.

20 Q. And what were your duties, if you could tell
21 the jury, as the hazardous materials engineer?

22 A. It was -- I managed the hazardous waste
23 program, which involved regulation of generators of
24 hazardous waste, also the permitted treatment,
25 storage, and disposal facilities.

1 Q. Okay. Did those duties include oversight of
2 any personnel?

3 A. Yes. I had a staff of approximately nine
4 people.

5 Q. Okay. And that staff was composed of what type
6 of employees?

7 A. Engineers, geologists, chemists, and program
8 specialists.

9 Q. Okay. In your role as hazardous materials
10 engineer did you ever communicate or discuss issues
11 with the Environmental Protection Agency?

12 A. Yes. It would be relatively common to do that.

13 Q. So you mentioned some of your duties. Did your
14 duties involve the oversight and issuance of RCRA
15 permits? I'm going to say RCRA. Do you know what
16 that term is?

17 A. RCRA stands for the Resource Conservation and
18 Recovery Act, which is a federal law which was
19 enacted in 1976.

20 And, yes, I was involved with the issuance of
21 permits.

22 Q. Okay. And those issuance were for the
23 treatment, storage, and disposal of hazardous
24 waste?

25 A. That is correct.

1 Q. And is there something known as a TSDF permit?

2 A. Yes. A treatment, storage, and disposal
3 facility permit.

4 Q. Okay. So we may use that term, TSDF. And so
5 that's -- that is a known term to you?

6 A. Correct.

7 Q. All right. When a facility wants to apply for
8 a TSDF permit, what is typically the first step in
9 that process?

10 A. Typically we would have a pre-application
11 conference with the applicant, and that would
12 involve individuals from the hazardous waste
13 program and generally someone from our permit
14 administration program.

15 Q. Okay. So that would be a conference before the
16 actual application is submitted?

17 A. That is correct.

18 Q. And where would that conference occur?

19 A. Typically that would be at our DEC office in
20 Buffalo.

21 Q. Okay. And so there's -- are there things
22 discussed during this pre-application conference?

23 A. Yes. We attempt to get, you know, some general
24 facility information, what hazardous waste
25 management activities the applicant is considering

1 to undertake at their facility.

2 Q. Okay. Is that an important part of the
3 process, to have this conference to try to
4 understand what is -- the application is going to
5 be based on?

6 A. Yes, it is. It's important for us and also the
7 applicant.

8 Q. Now, that's the pre-application conference. Is
9 there an actual permit application --

10 A. Yes, there is.

11 Q. -- that gets used? And can you describe what
12 goes into the RCRA permit application?

13 A. There is essentially two parts to it. A Part
14 A, which has general facility information. It will
15 have estimated quantities of hazardous waste which
16 they want to manage, the methods under which they
17 want to manage the hazardous waste, i.e.,
18 treatment, storage in tanks, storage in containers.

19 And then there's actually a Part B application,
20 which has more details about the individual units
21 that they wish to operate at the facility. It will
22 have information about contingency planning,
23 preparedness and prevention activities, how often
24 they would need to inspect the facility to ensure
25 that the hazardous waste is being managed

1 appropriately.

2 Q. All right. So -- so, assuming the application
3 gets submitted with all that information you just
4 discussed, Mr. Strickland, what, if anything,
5 happens after the application is submitted?

6 A. The application is submitted to us. We would
7 review the application. Typically there -- we
8 would generate some comments related to that, that
9 review. We would relay those back to the
10 applicant, and they would revise the application in
11 accordance with the comments, or meet with us and
12 discuss the comments to make sure that they
13 understood exactly what we were asking for.

14 Q. Okay. So there's this -- is there this
15 opportunity given to the applicant to respond to
16 any comments that DEC may have?

17 A. Yes.

18 Q. And is it a sort of a back-and-forth process?

19 A. Yes. It can go back and forth a couple of
20 times.

21 Q. Okay. Now, does DEC -- once the back-and-forth
22 between DEC and the facility is concluded, is there
23 any type of draft permit that is issued?

24 A. Yes. Once we're satisfied with the
25 application, we actually draft the permits and

1 place the appropriate conditions in the permit.

2 Q. All right. And what happens after the draft
3 permit gets issued?

4 A. Well, once we've developed a draft permit, we
5 issue what's known as a notice of complete
6 application, which starts a public comment period.
7 And for a hazardous waste permit that's a 45-day
8 comment period.

9 Q. So what happens if there are comments by the
10 public or some other party?

11 A. We review the comments. If there seems to be
12 something that needs to be modified within the
13 permit based on those comments, we would do that.

14 Q. Okay. So changes could be made after the draft
15 is issued?

16 A. That is correct.

17 Q. Is there a process by which DEC documents the
18 comments and responses?

19 A. Yeah. We develop what is called a
20 responsiveness summary, which will list all of the
21 comments and the action that we took in regard to
22 those comments.

23 Q. Okay. And if there are differences -- are
24 there sometimes differences between the DEC and the
25 facility at this stage of the process?

1 A. Yes, there can be. There can be -- we could go
2 to what's termed an adjudicatory hearing, which is
3 a hearing before an administrative law judge, to
4 resolve issues that the two parties cannot come to
5 agreement on.

6 Q. How often does that happen?

7 A. It's relatively rare.

8 Q. All right. So, after that process happens,
9 does a permit get issued?

10 A. Once -- yes, once we're through that process,
11 the permit would be issued by our regional permit
12 administrator.

13 Q. Okay. So that's an office in the DEC?

14 A. Yes.

15 Q. So --

16 A. It's in the regional office.

17 Q. The DEC would issue the permit?

18 A. That is correct.

19 Q. So, when a permit, a treatment storage disposal
20 facility, this TSDF permit is issued, how long of a
21 time period are those valid for?

22 A. They're either five-year terms or ten-year
23 terms.

24 Q. Can you tell the jury how many TSDF new and
25 renewal permits are handled by Region 9 in a given

1 year?

2 A. Usually one.

3 Q. And so between 1994 and 2010 at the time you
4 were the hazardous materials engineer, how many --
5 how many of those permits issued one a year would
6 you have reviewed?

7 A. Sixteen or so.

8 Q. Okay. One per year?

9 A. About one a year.

10 Q. Would you have reviewed all of the RCRA permits
11 during your time?

12 A. Yes.

13 Q. Okay. And again, during your tenure as
14 hazardous materials engineer -- I'm sorry. I asked
15 you that question. It's fair to say you reviewed
16 them all during your tenure?

17 A. Yes.

18 Q. All right. Now, you just described for us,
19 Mr. Strickland, the process by which a facility
20 would apply to DEC to get a permit, is that right?

21 A. That's correct.

22 Q. All right. Would it be possible for a facility
23 to, in essence, bypass DEC and go directly to the
24 EPA?

25 A. If they did, the EPA would refer that back to

1 us, because we -- the New York State is authorized
2 to administer the hazardous waste program in New
3 York State.

4 Q. Okay. So DEC would be involved in the process
5 of issuing any permit under RCRA in New York State?

6 A. Yes, we would.

7 Q. Okay. Let me ask you, as part of your duties
8 when you were hazardous materials engineer, did you
9 get involved in issuing any type of written
10 regulatory interpretation and/or guidance to the
11 RCRA permit holders?

12 A. Yes. To permittees and just the regulated
13 community.

14 Q. Okay. How would that come about?

15 A. Generally there would be -- you know, a permit
16 holder would not fully understand the requirements
17 in the regulations, or a generator would have
18 trouble understanding requirements in our
19 regulations.

20 Q. And it would fall on your shoulders to provide
21 interpretation and guidance on that?

22 A. Yes.

23 MR. LINSIN: Objection, your Honor, to
24 this line of questioning on grounds of relevance.

25 THE COURT: Mr. Mango.

1 MR. MANGO: Your Honor, I'm just
2 attempting to establish the expert qualifications
3 for this witness. I don't plan to go any further
4 on these questions.

5 THE COURT: Okay. Let's move on then,
6 please.

7 MR. MANGO: Yes, your Honor.

8 BY MR. MANGO:

9 Q. Mr. Strickland as part of your duties when you
10 were hazardous materials engineer, were you
11 responsible for keeping RCRA inspectors who worked
12 for you in your region current with all new
13 practices and/or guidance documents?

14 A. Yes, I was.

15 Q. And can you tell the jury what your educational
16 background is?

17 A. I have a Bachelor of Science degree in
18 mechanical engineering.

19 Q. And do you hold any type of professional
20 license?

21 A. Yes. I'm a professional engineer licensed in
22 New York State.

23 Q. And how about any membership in any
24 organization -- professional organizations?

25 A. I'm a board member of the Air and Waste

1 Management Association, Niagara Frontier Section.

2 Q. Okay. As a board member, what are your duties
3 as a board member?

4 A. As a board member we set up the -- what we call
5 the program for the year, which is a series of
6 dinner meetings where we have professionals in the
7 air and waste management business give
8 presentations to our membership.

9 Q. Okay. And you're involved in setting those up?

10 A. Yes. And we also give out scholarships for
11 college students.

12 Q. Okay. Have you received any type of training
13 with DEC regarding RCRA?

14 A. Yes. I've attended approximately 14 RCRA
15 inspector training courses, and I've taken various
16 courses on hazardous waste management and
17 environmental remediation.

18 Q. Okay. Now, we've been talking this term RCRA,
19 Resource Conservation and Recovery Act. Are you
20 familiar with that act?

21 A. Yes, I am.

22 Q. How are you familiar with RCRA?

23 A. RCRA -- New York State has its waste
24 regulations as stringent as the federal EPA
25 regulations, and it's through the exercise and use

1 of those regulations that I'm familiar. Also
2 through the permitting process.

3 Q. Okay. And as your role as hazardous material
4 engineer, is that right?

5 A. Yes.

6 Q. All right. Are you familiar with the
7 implementing regulations under RCRA?

8 A. The New York State regulations, yes.

9 Q. Yes. Are you familiar with the permitting
10 scheme under RCRA?

11 A. Yes.

12 Q. Do you know if DEC -- you mentioned this -- is
13 authorized to implement RCRA in New York State?

14 A. Yes, the DEC is.

15 Q. Okay. So are you familiar with -- now, let me
16 ask you -- Title 6 of the New York Code Rules and
17 Regulations, NCYCRR Parts 370 to 376?

18 A. Yes.

19 Q. Okay. Just briefly, if you can tell the jury,
20 what are those parts?

21 A. Part 370 is general information and definitions
22 related to our hazardous waste management program.
23 Part 371 is the identification and listing of
24 hazardous waste. Part 372 is regulations related
25 to generators and transporters of hazardous waste.

1 Part 374 contains regulations for specific types of
2 hazardous wastes. Part 375 is actually not in the
3 hazardous waste program, and Part 376 is the land
4 disposal restrictions.

5 Q. All right. And so in your career at DEC,
6 approximately how many years have you been involved
7 in RCRA compliance issues and RCRA inspection
8 issues?

9 A. Sixteen years.

10 MR. MANGO: Your Honor, at this point,
11 based on Mr. Strickland's experience in the field
12 of RCRA for the past 16 years, his education, his
13 continuing education in the field of RCRA, his
14 knowledge of the RCRA statute, its implementing
15 regulations and its definitions, and in particular
16 his understanding of the New York scheme that
17 allows a facility to obtain a permit and get a
18 permit, I offer Mr. Strickland as an expert in the
19 field of permitting under RCRA and the regulations
20 and definitions relating to the permitting program
21 under RCRA.

22 THE COURT: From the standpoint of New
23 York State?

24 MR. MANGO: Yes, your Honor.

25 THE COURT: Any comments, Mr. Linsin?

1 MR. LINSIN: We have no objection to
2 receiving Mr. Strickland's testimony on that basis,
3 your Honor.

4 THE COURT: All right. And Mr. Personius?

5 MR. PERSONIUS: No objection, your Honor.

6 THE COURT: Okay. As tendered, the
7 witness will be presented to the jury for purposes
8 of permitting and the process involving permitting
9 as it relates to RCRA and the State of New York and
10 its applicable regulations.

11 Now, ladies and gentlemen, keep in mind that
12 Mr. Strickland is being tendered as an expert
13 witness, meaning that he has by training,
14 background, and experience, and education an
15 expertise that may be helpful to you in
16 understanding the issues that will be presented
17 through testimony.

18 You are to evaluate and assess his credibility
19 the same like you do with any and all of the other
20 witnesses that have testified in this trial. He
21 gets no special treatment by virtue of the fact
22 that he is an expert, but you may consider those
23 areas of his testimony based on his expertise to
24 help you where you may not have the type of
25 background and ability to work through the

1 permitting aspect of this case without his
2 testimony.

3 So, with that, Mr. Mango, you may proceed.

4 MR. MANGO: Thank you, your Honor.

5 BY MR. MANGO:

6 Q. Mr. Strickland, are you familiar with the term
7 "interim status" under RCRA?

8 A. Yes, I am.

9 Q. Can you tell the jury what that means, interim
10 status?

11 A. Interim status was -- came into being because
12 in 1980 the federal government promulgated their
13 first set of RCRA regulations, so there were
14 facilities which were undertaking activities prior
15 to 1980, which after 1980 possibly could have
16 needed a permit. So they would have been
17 immediately thrown into a -- in a noncompliance
18 mode. So interim status was developed to allow
19 those facilities to keep operating after 1980,
20 doing what they were doing until they could be
21 evaluated to determine whether they did need a RCRA
22 permit or not.

23 Q. Okay. Mr. Strickland, are you familiar with a
24 company known as the Tonawanda Coke Corporation?

25 A. Yes, I am.

1 Q. And did you have an opportunity to review the
2 DEC RCRA file on the Tonawanda Coke Corporation?

3 A. Yes, I did.

4 Q. And based on that review, did the Tonawanda
5 Coke Corporation have any type of interim status
6 between the period of 1998 and 2009?

7 A. No.

8 Q. And did you review the DEC regulatory
9 inspections?

10 MR. LINSIN: Your Honor, I apologize for
11 interrupting. Could I just get the years that that
12 last question was framed?

13 THE COURT: 1998 through 2009?

14 MR. MANGO: Yes.

15 MR. LINSIN: Thank you.

16 BY MR. MANGO:

17 Q. And, in fact, I'll even broaden it. Do you
18 know if before 1998 Tonawanda Coke had any type of
19 interim status ever?

20 A. No.

21 THE COURT: You don't know, or they did
22 not?

23 THE WITNESS: They did not.

24 THE COURT: Thank you.

25 BY MR. MANGO:

1 Q. And, Mr. Strickland, did you review the DEC
2 regulatory -- the DEC regulatory inspections at the
3 Tonawanda Coke Corporation prior to 2009?

4 A. Yes, I did.

5 Q. And if you can tell the jury, which inspections
6 did you specifically review?

7 A. I looked at -- the first inspection was in
8 1989, the second inspection was 1997, the third
9 inspection was in 2007, and the fourth was --
10 excuse me. I said '97. 2001. And the fourth was
11 in 2007.

12 Q. Okay.

13 THE COURT: Okay. Give us those again,
14 because I'm not sure I understood. 1989.

15 THE WITNESS: 1989, 1997, 2001, and 2007.

16 BY MR. MANGO:

17 Q. Okay. So you've reviewed those inspection
18 reports from the DEC file?

19 A. Yes.

20 Q. Are you familiar with the terms "large-quantity
21 generator" and "small-quantity generator"?

22 A. Yes, I am.

23 Q. Okay. From those four inspection reports,
24 those years, do the inspection reports identify
25 Tonawanda Coke as one or the other of these, large

1 or small?

2 A. They identify Tonawanda Coke as a
3 small-quantity generator.

4 Q. Okay. And in your experience as head of the --
5 as engineer of the hazardous materials division,
6 how do inspectors obtain information to complete a
7 small-quantity generator inspection report?

8 A. They obtain the information via conversations
9 with the operator; they obtain information via
10 their observations of the activities at the
11 facility.

12 Q. Okay. Could it be one or the other?

13 A. It would generally be both.

14 Q. Okay. Now, did you see any mention of the --
15 of a term, let me tell you, "K087" in the
16 inspection reports?

17 A. Yes, I did.

18 Q. Do you know what K087 is?

19 A. Yes, I do.

20 Q. So prior to June of 2009 was there any
21 indication in those reports as to how the K087
22 waste was being recycled at the Tonawanda Coke
23 Corporation?

24 A. The one report indicated that the K087 was
25 being mixed with pulverized coal and recycled back

1 into the coke ovens.

2 THE COURT: What do you understand K087 to
3 be?

4 THE WITNESS: K087 is hazardous waste from
5 a specific source in the by-products process. It's
6 tar decanter sludge.

7 BY MR. MANGO:

8 Q. You mentioned in one of the reports there was a
9 mention of the K087 was mixed with pulverized coal
10 and then recycled to the coke ovens?

11 A. Yes.

12 Q. In any of the reports did it say where the K087
13 was being mixed with the coal?

14 A. No, it was not identified.

15 Q. The inspection reports that you just went
16 through, these four inspection reports prior to
17 June of 2009, did the Tonawanda Coke Corporation
18 indicate whether or not it was storing any
19 hazardous waste longer than 90 days at the
20 facility?

21 A. No, it did not.

22 MR. LINSIN: Your Honor --

23 THE COURT: Yes?

24 MR. LINSIN: Never mind. I'll cover it on
25 cross. Thank you.

1 THE COURT: Okay.

2 MR. LINSIN: I apologize.

3 BY MR. MANGO:

4 Q. Mr. Strickland, did you review the indictment
5 in this case?

6 A. Yes, I did.

7 Q. Okay. Are you familiar with the conduct
8 alleged in Counts 17, 18 and 19 of the indictment?

9 A. Yes, I am.

10 Q. Okay. What is your understanding of the
11 conduct alleged to have occurred in Count 17?

12 A. Count 17 was the storage of characteristic
13 hazardous waste. It was characteristic for benzene
14 on the ground, and that storage occurred from -- it
15 was alleged to have occurred from 1998 till 2009.

16 Q. Okay. All right. Can you tell the jury
17 whether Tonawanda Coke had a RCRA permit issued by
18 DEC or EPA to engage in this conduct?

19 A. No, they did not.

20 Q. Based on your experience as head of the Region
21 9 RCRA program, would DEC have issued a permit for
22 this conduct?

23 A. For that type of storage, no.

24 Q. Okay. Tell the jury why.

25 A. Because it was stored on the ground, there were

1 no engineering controls related to the storage of
2 that material.

3 Q. Okay. What is your understanding, if you can
4 tell the jury, of Count 18 of the indictment?

5 A. Count 18 involves the same characteristic
6 hazardous waste for benzene, which was removed from
7 one of the tanks which were cut down on the
8 property, and that material was then taken to the
9 coalfields and applied to the coal.

10 Q. Okay. Mr. Strickland, do you know if the
11 Tonawanda Coke Corporation had a RCRA permit issued
12 by DEC or EPA to engage in this conduct alleged in
13 Count 18?

14 A. No, they did not.

15 Q. And based on your experience as head of the
16 Region 9 RCRA program, would DEC have issued a
17 permit for this type of conduct?

18 A. No, we would not.

19 Q. Okay. Why?

20 A. Just because the method in which the material
21 was managed leaves the possibility that it could
22 come in contact with the ground and constitute
23 disposal.

24 Q. Okay. Mr. Strickland, what is your
25 understanding of the conduct alleged to have

1 occurred in Count 19 of the indictment?

2 A. Count 19 would have involved the K087 waste,
3 which was once again applied to the coal in the
4 coalfield.

5 Q. Okay. Did the Tonawanda Coke Corporation have
6 a RCRA permit issued by DEC or EPA to engage in
7 this conduct?

8 A. No, they did not.

9 Q. And again, based on your experience as head of
10 the Region 9 RCRA program, would DEC have issued a
11 permit for this type of conduct?

12 A. No.

13 Q. And why?

14 A. For the same reason, that the hazardous
15 constituents from the waste could come in contact
16 with the ground in an uncontrolled fashion.

17 Q. All right. In fact, for any period of time --
18 or for the period of time between 1998 and 2009 did
19 the Tonawanda Coke Corporation have any type of
20 RCRA permit issued by DEC or EPA to handle any type
21 of hazardous waste?

22 A. No, they did not.

23 MR. MANGO: Thank you, your Honor.

24 Nothing further for this witness.

25 THE COURT: Okay. Thank you, Mr. Mango.

1 Mr. Linsin.

2 MR. LINSIN: May I proceed, your Honor?

3 THE COURT: You may. Thank you.

4 CROSS-EXAMINATION BY MR. LINSIN:

5 Q. Good morning, Mr. Strickland.

6 A. Good morning.

7 Q. I don't believe we've met before. My name is
8 Greg Linsin. I represent the Tonawanda Coke
9 Corporation.

10 Did you ever visit the Tonawanda Coke facility,
11 sir?

12 A. Yes, I've been there twice.

13 Q. All right. And before we go there, can you
14 tell me, please, what materials other than the DEC
15 file that you've testified about -- what materials
16 did you review in connection with your preparations
17 for your testimony here today?

18 A. I've reviewed various emails that were between
19 various state employees, DEC employees, and EPA
20 employees.

21 Q. In what time frame, sir?

22 A. Those would be probably in the 2009 time frame
23 and probably some after that.

24 Q. All right. Anything else?

25 A. I've looked at the RCRA file. I've looked at

1 the charges --

2 Q. And you're referencing -- I'm sorry. I didn't
3 mean to interrupt. Your reference -- when you talk
4 about the RCRA file, you're talking about the DEC's
5 RCRA file?

6 A. Yes.

7 Q. All right. Please go ahead.

8 A. I looked at the indictment, with the charges.

9 Q. Are you familiar with the factual stipulations
10 that have been entered into the record in this case
11 regarding the materials that were maintained in
12 these two tanks that you just testified about?

13 A. Yes, I am.

14 Q. You've read those?

15 A. Yes.

16 Q. Have you reviewed the testimony of any of the
17 witnesses who have testified in this trial
18 regarding the management of the K087 or the D018
19 materials on the Tonawanda Coke facility?

20 A. No, I have not.

21 Q. You had a direct involvement in this DEC's
22 oversight of Tonawanda Coke back at least beginning
23 with your taking on the duties as the regional
24 hazardous waste engineer in 1994, is that correct?

25 A. That would be correct.

1 Q. And scrolling forward for a moment to 2009, you
2 were Tom Corbett's supervisor, is that correct?

3 A. Yes, I was.

4 Q. And were you familiar with the fact that
5 Mr. Corbett went out, along with a Mr. Lenny
6 Grossman and an Ellen Banner, in June of 2009 and
7 inspected the Tonawanda Coke facility for RCRA
8 compliance purposes?

9 A. Yes, I was aware that he went out with Len
10 Grossman. The other individual I don't know.

11 Q. Now, you testified a moment ago that you
12 actually visited the Tonawanda Coke facility on a
13 couple of occasions.

14 A. Yes.

15 Q. What was the first date that you personally
16 visited this facility?

17 A. It was April of 2010.

18 Q. Do you recall -- have you reviewed the summary
19 of your proposed testimony that was submitted in
20 connection with the government's pretrial
21 submissions in this case?

22 A. Yes, I have.

23 Q. Was that submission accurate as far as it
24 related to your proposed testimony?

25 A. I think there were some inaccuracies. I don't

1 recall.

2 Q. Do you recall that in that submission there was
3 an indication that you had visited the Tonawanda
4 Coke facility shortly after the April 2009 air
5 inspection?

6 A. That is incorrect.

7 Q. Did you point that fact out to the prosecutors
8 before you -- when you reviewed this?

9 A. I believe I did, but I think I saw that after
10 it was submitted.

11 Q. All right. So the first time -- that
12 submission aside, then the first time you actually
13 visited the facility was in 2010, is that correct?

14 A. That is correct.

15 Q. All right. Now, you testified that you
16 reviewed in preparation for your testimony several
17 of the DEC inspection reports that were -- the RCRA
18 compliance reports that were completed by people
19 under your supervision, correct?

20 A. That is correct.

21 Q. And if I heard you correctly, it was the '89
22 inspection report, '97 inspection report, 2001,
23 and 2007, is that correct?

24 A. That is correct.

25 Q. Are you aware of any other inspection reports

1 that have been completed by DEC with respect to
2 RCRA compliance for the Tonawanda Coke facility?

3 A. No, I am not.

4 Q. Are you aware that -- that EPA completed a
5 report of the June 17th, 2009, inspection at the
6 facility?

7 A. Yes.

8 Q. Have you reviewed that?

9 A. I have not seen that.

10 Q. Not at any point?

11 A. I don't think it was ever submitted to me.

12 Q. And you did not request to review it, is that
13 your testimony?

14 A. I did not request.

15 Q. And are you aware that there was also a report
16 prepared for -- in connection with the sampling
17 visit to the facility in September of 2009?

18 A. I am aware that there was a report.

19 Q. Did you review that report?

20 A. No.

21 Q. You did not request it?

22 A. No.

23 Q. In addition to the DEC inspection reports, were
24 you aware -- are you aware that the Tonawanda Coke
25 facility back in 1986 and again in 1988 submitted a

1 RCRA hazardous waste notification in '86? Have you
2 reviewed that document?

3 A. No, I have not.

4 Q. Are you aware, sir, that in 1986 the Tonawanda
5 Coke facility advised EPA that it was a generator
6 of K087 waste and that it was recycling that waste
7 on-site?

8 A. No, I am not.

9 Q. Did you review the 1988 submission by Tonawanda
10 Coke, part of a biannual submission -- reporting
11 submission, in which two years later Tonawanda Coke
12 advised EPA that it was generating K087 waste and
13 recycling that waste on-site? Are you aware of
14 that submission?

15 A. No, I am not.

16 Q. Isn't it common, Mr. Strickland, for DEC and
17 EPA to share information that either agency may
18 receive about hazardous waste generators?

19 A. It is common, but there are instances where we
20 don't have certain notifications.

21 Q. Let's go back to the 1980s, and I understand
22 from your testimony you were not in a position
23 dealing with hazardous waste in the '80s, is that
24 correct?

25 A. That's correct.

1 Q. Well, let me ask you a couple of questions. Is
2 it fair to say, based on what you've now learned
3 about hazardous waste, that during the 1980s there
4 was a significant amount of activity regarding the
5 development of the national regulations for the
6 RCRA program?

7 A. Yes.

8 Q. And as you testified a moment ago, Part B
9 interim status was implemented to accommodate
10 facilities that -- while they were applying for a
11 RCRA permit, correct?

12 A. That is correct.

13 Q. And there were some fundamental definitions
14 that were developed during that 1980s period
15 regarding what was going to be considered a solid
16 waste, correct?

17 A. Correct.

18 Q. And as a matter of fact, there were also some
19 very significant regulations developed and
20 promulgated in the late 1980s regarding the land
21 disposal regulations and what was going to be
22 permitted to be disposed of on the land, is that
23 correct?

24 A. That is correct.

25 Q. All right. So, now, I asked those background

1 questions because I want to confirm my
2 understanding that based on your review of DEC's
3 files, this 1989 inspection report was DEC's first
4 contact, for RCRA compliance purposes, with the
5 Tonawanda Coke facility, is that correct?

6 A. It's the first that's evidenced in our file.

7 Q. All right. And so when -- do you know who
8 conducted that RCRA compliance inspection?

9 A. That was Ray Fisher.

10 Q. All right. Do you know Mr. Fisher?

11 A. Yes, I do.

12 Q. Have you spoken to him about what he did during
13 the course of that inspection?

14 A. No, I have not.

15 Q. When Mr. Fisher -- were you aware that when
16 Mr. Fisher went out to inspect the Tonawanda Coke
17 facility in 1989, that the Tonawanda Coke already
18 had an EPA generator number, ID number?

19 A. Yes, because it's displayed on the inspection
20 report.

21 Q. Okay. That indicates to you, does it not, that
22 even if you may not have reviewed it before, that
23 previous to the '89 inspection Tonawanda Coke had
24 in effect raised its hand in the 1980s and
25 submitted this report to EPA saying, hey, we're

1 generating K087, correct?

2 A. If it was listed on their notification, yes.

3 Q. And as a matter of fact, that was then
4 repeated -- or this biannual submission in '88
5 repeated the very same notification, is that
6 correct?

7 A. If it was listed, that would be correct.

8 Q. So your DEC RCRA compliance inspector is aware
9 in 1989 that this facility has self-notified that
10 it is a generator of K087, because it has an EPA
11 generator ID number. It is DEC's very first
12 contact with this facility since the enactment of
13 RCRA, correct?

14 A. Correct.

15 Q. It is DEC's first contact with this facility
16 after this fundamental definition of solid waste
17 has been put in place, correct?

18 A. That is correct.

19 Q. Ands it is also DEC's first contact with this
20 facility, that has told DEC it's generating K087,
21 since the enactment of the land disposal
22 regulations, correct?

23 A. That is correct.

24 MR. LINSIN: May I please have Defendant's
25 Exhibit B, which is in evidence. B as in boy. I'm

1 sorry.

2 BY MR. LINSIN:

3 Q. Now, this is the first page of the exhibit,
4 Mr. Strickland. I'm going to ask that we scroll
5 through. I apologize in advance. A couple of
6 these pages are out of order. And this first page,
7 as you can see, is actually a cover memorandum that
8 wasn't related to the inspection report. But have
9 you seen this first page of Defendant's Exhibit B
10 before?

11 A. Yes, I have.

12 Q. All right. Could we please go to the next
13 page?

14 Have you seen this letter that was sent to
15 Tonawanda Coke following the inspection in 1989?

16 A. Yes, I have.

17 Q. And then you recognize this as the first page
18 of the actual inspection, RCRA compliance
19 inspection form?

20 A. Yes, it is.

21 Q. All right. Now, can we please go to -- well,
22 here is the table of contents for the entire
23 inspection report form. The next page is actually
24 out of sequence, and so we will skip over this page
25 and come back to it in a moment.

1 But do you recognize this as the first
2 substantive page of the findings of the report?
3 This would be Roman numeral I-1.

4 A. Yes.

5 Q. All right. And if we could go to -- the
6 indication here midway down the page -- and if we
7 can enlarge just this portion, please.

8 Indication here again, the K087 decanter tank
9 tar sludge from coking operations. That is the
10 listed waste that is being generated on-site,
11 correct?

12 A. That is correct.

13 Q. All right. And if we could then go to Roman
14 I-2. And can you enlarge this portion of the page,
15 please.

16 There is a section of the form that says, "If
17 the facility is a treatment, storage, or disposal
18 facility, have they," and then there is a series of
19 questions, correct?

20 A. This is correct.

21 Q. And Mr. Fisher wrote in the words "not
22 applicable," correct?

23 A. Correct.

24 Q. And submitted a Part A application, that's N/A,
25 correct?

1 A. Uh-huh.

2 Q. And a Part A application is a RCRA permit
3 application, correct?

4 A. It is the first part of the RCRA permit
5 application.

6 Q. And so Mr. Fisher, based on these findings, has
7 determined that the RCRA permit application is not
8 applicable to this facility, correct?

9 A. That is correct. It has not been submitted.

10 Q. And if we could go to Roman I-4, please.

11 And you see here, beginning on this page, this
12 is the -- the general heading before we enlarge
13 this is Status Identification. That is the number
14 2 at the top, correct?

15 A. Correct.

16 Q. And then here we have treatment, storage, or
17 disposal facility status, correct?

18 A. Correct.

19 Q. And the question here in number 1 under C is,
20 "Is hazardous waste generated and stored on-site?
21 If so," and then a series of questions, each of
22 which Mr. Fisher has said no to, correct?

23 A. That is correct.

24 Q. So he made a determination in 1989 that
25 hazardous waste was not generated and stored on the

1 site, correct?

2 A. This indicates that hazardous waste -- has
3 hazardous waste been stored on-site longer than 90
4 days? He answered no to that.

5 Q. All right. And is that one of the permit
6 conditions?

7 A. If they were -- if they stored hazardous waste
8 on-site for longer than 90 days, they would be
9 required to have a permit, if they were a
10 large-quantity generator.

11 Q. All right. Now, could we back out of this
12 again so we can get the larger page, and move then
13 to Roman numeral I-5. And again, to the -- well,
14 actually, as long as we're going to do this, let's
15 bring it all the way down here.

16 So this is a follow-on from the previous page,
17 correct?

18 A. Correct.

19 Q. And Mr. Fisher has concluded that there's no
20 hazardous waste received from off-site, correct?

21 A. Correct.

22 Q. No hazardous waste being treated on-site,
23 correct?

24 A. That is correct.

25 Q. And no hazardous waste is disposed of on-site,

1 correct?

2 A. That is correct.

3 Q. And again, in the margin to the left-hand side
4 he has written, "All K087 sludges are recycled into
5 the process," right?

6 A. That is correct.

7 Q. And you testified on direct examination that
8 the -- it is your understanding that a RCRA
9 compliance inspector, in conducting a RCRA
10 compliance inspection, would generally speak both
11 with the operator of the facility and then observe
12 the activities that were in question, correct?

13 A. That is correct.

14 Q. And if we could go back to -- I'm sorry --
15 Roman numeral I-3, please. Which is -- yes. Yes.
16 Thank you.

17 Are you familiar with this page?

18 A. Yes, I am.

19 Q. And you've read this page?

20 A. Yes, I have.

21 Q. And so you're aware that in the handwritten
22 text here Mr. Fisher describes in some detail what
23 happens to the K087 material at Tonawanda Coke,
24 correct?

25 A. Yes, he does.

1 Q. He even had to go outside of the margins,
2 because there weren't enough line space to contain
3 the information he wanted to record, correct?

4 A. That is correct. Ray liked to do that.

5 Q. And Ray Fisher determined, based on DEC's very
6 first RCRA compliance inspection of this facility,
7 that this facility didn't have and didn't need a
8 permit, correct?

9 A. That is correct.

10 Q. And is there any place at all in the remainder
11 of the DEC's regulatory files from 1989 forward to
12 2009, anything in any of those files that indicate
13 a determination by DEC that Tonawanda Coke needed a
14 RCRA permit for the activities it was conducting?

15 A. No, there is not.

16 Q. And that's a 20-year period, correct?

17 A. Correct.

18 MR. LINSIN: Your Honor, I have a little
19 bit more. Would this perhaps be a convenient time
20 for a break?

21 THE COURT: A break?

22 MR. LINSIN: Yes.

23 THE COURT: I know it's been somewhat
24 short for all of you, ladies and gentlemen, but
25 you've been here since the time that I asked you

1 to, and I thank you for that. We've been pretty
2 busy, and so we need to take a break. We'll see
3 you back here -- we'll get started by 2:15, but if
4 you can get here at 2 o'clock or so, we'll try to
5 be available then. Okay?

6 Thank you very much. Please keep your minds
7 open, and we will get started as soon as we can.
8 Enjoy the day.

9 (Jury excused from the courtroom).

10 THE COURT: Okay. Mr. Strickland, you can
11 step down. Thank you.

12 Anything else?

13 MR. LINSIN: No.

14 THE COURT: Okay. Thank you. We'll see
15 you at -- try to be here about 2 o'clock. We will
16 be starting between 2:00 and 2:15, I think. Thank
17 you.

18 (Lunch recess was taken.)

19 (Jury not present in the courtroom.)

20 MR. LINSIN: Your Honor, just very briefly
21 on the scheduling issue that I had mentioned today,
22 because I think it may relate to our timing and
23 perhaps the Court's instruction to the jury as they
24 depart. Based on my estimate of finishing cross
25 and what we expect Mr. Conway's testimony to be, it

1 seems fairly clear to us that the government will
2 be resting some time this afternoon.

3 THE COURT: Okay.

4 MR. LINSIN: As we've already advised
5 government counsel, we believe we will be calling
6 five witnesses in our defense case, four relatively
7 short witnesses and, presuming the Court allows,
8 our RCRA expert to testify on RCRA issues.

9 For scheduling purposes during the week, we
10 know the Court is off on Friday, and what we were
11 going to request of the Court for timing purposes
12 is that you permit us to begin our defense case on
13 Wednesday morning and getting all of that testimony
14 then in Wednesday morning and Thursday. We have
15 two witnesses on that list of five who, because we
16 have advanced our schedule, are not able to be into
17 town until Thursday. And so our belief is that if
18 we start on Wednesday we will certainly conclude
19 some time on Thursday.

20 And I just wanted to raise it, because if it
21 made sense to the Court, it might be that then that
22 we could obviate the need for the jurors to come in
23 for three partial days, and it would just make the
24 flow a whole lot easier.

25 THE COURT: So we'd have them come in on

1 Wednesday and Thursday?

2 MR. LINSIN: That would be our request,
3 your Honor, yes.

4 MR. PERSONIUS: Judge, just a point of
5 clarification. My understanding is we have one
6 witness coming from out of town. We have another
7 witness who's from Buffalo, but he's self-employed,
8 and it is far better for him if he could testify
9 Thursday than Tuesday or Wednesday. It's not a big
10 deal, but --

11 THE COURT: No. Understood. Thank you.
12 Mr. Mango.

13 MR. MANGO: Your Honor, whatever the Court
14 would desire to do, we're comfortable with.

15 THE COURT: Okay. All right. Well, we'll
16 try to put that schedule in place. I don't see why
17 that would not work. Let's see how we do today,
18 and if we can wrap up the witness testimony, that
19 would be a good thing.

20 Okay. Chris, if you'd bring the jury in
21 please.

22 MR. PERSONIUS: Judge, as Chris is doing
23 that, the other request -- we've talked to the
24 government about it -- at a point you think
25 appropriate in Mr. Conway's testimony, if you could

1 please consider giving the jury an instruction on
2 summary charts and the fact that they're not
3 evidence.

4 THE COURT: Okay. Certainly.

5 MR. PERSONIUS: Thank you, Judge.

6 MR. MANGO: I believe they are evidence,
7 but they should be also -- well --

8 MR. PERSONIUS: Whatever the instruction
9 is.

10 MR. MANGO: Maybe we need to look at the
11 instruction. I'll look at the instruction.

12 THE COURT: Okay. All right. You're
13 introducing them as demonstrative evidence.

14 MR. MANGO: Yes.

15 THE COURT: But summary.

16 MR. MANGO: Right. To aid the jury. Yes,
17 that's correct. So -- but they do get to go back
18 with the jury during deliberation, but --

19 (Jury seated.)

20 THE COURT: Okay. Welcome back. Please
21 have a seat.

22 Okay. The attorneys and parties are back
23 present, and the jury is here, roll call waived.
24 Mr. James Strickland is on cross-examination. He
25 remains under oath.

1 Mr. Linsin, your witness.

2 MR. LINSIN: Thank you, your Honor.

3 BY MR. LINSIN:

4 Q. Good afternoon, Mr. Strickland.

5 A. Good afternoon.

6 MR. LINSIN: Miss Henderson, may I please
7 have Defendant's Exhibit B again, already in
8 evidence. And could we please go to what is the
9 third page of this document. Third page of the
10 exhibit. Fourth page. I'm sorry. Back, back.
11 One more. Thank you. Right there.

12 BY MR. LINSIN:

13 Q. Could we enlarge -- you recognize this, sir, as
14 the inspection form -- DEC's first inspection form
15 for the Tonawanda Coke facility, correct?

16 A. Yes, I do.

17 Q. All right. Could we enlarge that portion.

18 You testified a little bit earlier that you
19 understood that Tonawanda Coke had made a
20 submission to EPA regarding its generator status
21 prior to this 1989 inspection, because at the time
22 of the '89 inspection the facility had an EPA
23 generator ID number, correct?

24 A. That is correct.

25 Q. And is this the number, handwritten in here

1 that has been enlarged?

2 A. Yes, it is.

3 Q. All right. And just for the record, does it
4 read NYD088413877?

5 A. Yes, it does.

6 Q. All right. And if I may please have for
7 identification -- if we take this down --
8 Defendant's Exhibit DDDD.02.

9 THE CLERK: Is it in evidence?

10 MR. LINSIN: I'm sorry?

11 THE CLERK: Is it in evidence?

12 MR. LINSIN: No. For identification.

13 MR. MANGO: Your Honor, I'd object at this
14 point. I believe we covered this during the
15 earlier portions of his cross-examination. He was
16 asked specifically about a 1989 -- or '86 and 1988
17 notice to EPA, and the witness said he was not
18 aware of it and did not know of it. Now we're
19 actually showing what appears to be that document
20 to the witness. I would object on that grounds.

21 MR. LINSIN: Your Honor, if I may ask a
22 couple of additional questions to clarify where I'm
23 going on this.

24 THE COURT: Certainly.

25 BY MR. LINSIN:

1 Q. All right. Do you recognize this form, sir?

2 A. Yes. It looks like the hazardous waste
3 notification form.

4 Q. All right. And if we could please scroll to
5 the third page of this exhibit. I'm going to ask
6 you, please, to enlarge this -- well, actually, let
7 me come back here. Enlarge that section of the
8 exhibit, please.

9 Do you recognize -- well, back out again,
10 please.

11 Do you recognize what this acknowledgment form
12 is?

13 A. Yes. It looks like the acknowledgment of
14 notification of hazardous waste activity.

15 Q. From EPA, correct?

16 A. From EPA.

17 Q. And now if we can enlarge this portion of
18 page 3 of the exhibit.

19 At the top left-hand corner of this enlarged
20 portion of page 3 of the exhibit, do you recognize
21 an ID number?

22 A. Yes, I do.

23 Q. And do you recognize that as the same EPA
24 generator ID number that appeared on the
25 inspection -- the DEC inspection form for the 1989

1 inspection?

2 A. Yes, that's the same number.

3 MR. LINSIN: Your Honor, I would move
4 Government's [sic] Exhibit DDDD.02 into evidence.

5 MR. MANGO: Your Honor, I would still
6 object here. There's been no foundation that he
7 has any knowledge. That the fact that the number
8 is the same doesn't establish a foundation for this
9 document, which is clearly an EPA document, through
10 this witness.

11 THE COURT: Okay. Mr. Linsin?

12 BY MR. LINSIN:

13 Q. Are generator ID numbers assigned by EPA unique
14 identification numbers for a given facility?

15 A. Yes, they are.

16 THE COURT: All right. Over objection,
17 I'll permit it. It will be admitted.

18 (Defendants Exhibit DDDD.02 was received
19 into evidence.)

20 MR. LINSIN: If we can go to the first
21 page of this exhibit, please. Yes.

22 Please, may it be published?

23 THE COURT: Yes.

24 BY MR. LINSIN:

25 Q. And if we can enlarge the framed portion of the

1 document.

2 Do you see this, sir? Do you recognize this as
3 an EPA hazardous waste activity notification form
4 from Tonawanda Coke Corporation?

5 A. Yes. That's what the document says.

6 Q. And the installation contact being identified
7 as Mark Kamholz, manager -- environmental manager,
8 correct?

9 A. That's correct.

10 Q. And if we could enlarge this portion of the
11 document, please. I'm sorry. Let's go all the way
12 across so we get the whole -- that whole portion of
13 the -- please go back, Sheila. And -- yeah. All
14 the way across.

15 Okay. When -- in the section marked mode of
16 transportation, do you see the box "other" checked?

17 A. Yes, it's checked.

18 Q. And with the explanation adjacent to it, when
19 it says specify, none, material is recycled
20 on-site, correct?

21 A. That's correct.

22 Q. All right. May we go to page 2, please, of
23 this exhibit. And do you recognize this topic --
24 this page, generally, as the place where the
25 generator identifies the hazardous waste that is

1 being generated on-site?

2 A. Yes, that's correct.

3 Q. And perhaps you can read it in the smaller,

4 but, Sheila, would you enlarge that portion.

5 Include the heading of that section, please. So

6 from here across.

7 Okay. So this is the section of the form where

8 Mark Kamholz on behalf of Tonawanda Coke

9 Corporation in this notification form is notifying

10 EPA that the facility is generating K087 waste,

11 correct?

12 A. That is correct.

13 Q. All right. And lastly on this page, please,

14 down at the bottom, if you enlarge that portion.

15 You see the signature of Mark Kamholz, manager

16 environmental control, dated February 13th, 1986,

17 correct?

18 A. Yes, it does state Mark Kamholz.

19 Q. All right. May I now please have -- let's come

20 out of this -- Defendant's Exhibit DDDD -- for

21 identification, DDDD01.01.

22 Do you recognize this form, sir?

23 A. Yes. It's Form IC, EPA form.

24 Q. Regarding a hazardous waste report, correct?

25 MR. MANGO: Your Honor, we're not going to

1 object. If the foundation is the same as what it
2 was before, we won't object to the admission of
3 this document into evidence.

4 MR. LINSIN: On that basis, your Honor, I
5 would now move Defendant's DDDD01.01 into evidence.

6 THE COURT: You're saying .01, but -- oh,
7 are you taking that from the Bates number?

8 MR. LINSIN: Yes, your Honor. The exhibit
9 number.

10 THE COURT: The exhibit number, I think is
11 DDDD.01?

12 MR. LINSIN: Yes.

13 THE COURT: That's the sticker number.
14 Okay. That will be received, no objection.

15 (Defendant's Exhibit DDDD.01 was received
16 into evidence.)

17 BY MR. LINSIN:

18 Q. And why does a generator submit a form like
19 this, sir?

20 A. The generator would submit this form to
21 identify the types of waste and quantities that
22 they generate.

23 Q. All right. Can we go to page 2 of this
24 exhibit, please. And first, if we could, in the
25 comment section, could we enlarge that section.

1 And do you see, sir, in the comment section of
2 this form, that Mr. Kamholz on behalf of Tonawanda
3 Coke is notifying EPA that the K087 which is
4 generated on-site is -- fits within the exemption
5 under 261.4C?

6 A. Yes. That is what it states.

7 Q. And it states after recycling there is no waste
8 material of any kind to be disposed of in any
9 manner, correct?

10 A. That's correct.

11 Q. Now, can we back out of this page, please, the
12 enlargement, and stay on this page. Could you
13 please enlarge this top box.

14 Are you familiar with coke production
15 facilities, generally, sir?

16 A. To a minor extent. I have no detailed
17 knowledge.

18 Q. Do you have any idea of how much K087 even a
19 medium-size coke production facility would generate
20 in a month?

21 A. I think I've seen in an inspection report that
22 it's about a ton. Could be a ton a month.

23 Q. So, 2,000 pounds or above, is that correct?

24 A. Correct.

25 Q. All right. And do you see indicated on this

1 form, completed by Mr. Kamholz on behalf of
2 Tonawanda Coke, that he is actually reporting in
3 1988 -- reporting that the facility is generating
4 more than a thousand kilograms, more than a ton, in
5 one month?

6 A. That is correct.

7 Q. All right. Okay. If we could come out of this
8 now.

9 And we can call it back up if you want, but
10 isn't it true that in each of the DEC inspection
11 reports that you testified about on direct
12 examination, that the DEC RCRA compliance
13 inspectors determined that Tonawanda Coke was, in
14 fact, a small-quantity generator? Isn't that true?

15 A. That is correct.

16 Q. Doesn't that reinforce the recognition that
17 these DEC inspectors understood that the K087 that
18 was generated at that facility was exempt from RCRA
19 regulation?

20 A. That is correct.

21 Q. Are you familiar with the term, as it relates
22 to RCRA, sir, the continuous production process?

23 A. I'm not familiar with that term.

24 Q. You've not understood that as a concept that
25 was important in the development of RCRA

1 regulations during the 1980s?

2 A. I'm not aware.

3 Q. All right. The process of recycling under RCRA
4 does not require a permit, correct?

5 A. That is correct.

6 Q. Now, you testified on cross-examination before
7 lunch that the first time you went to this
8 facility, the Tonawanda Coke facility, was in 2010,
9 correct?

10 A. That's correct.

11 Q. All right. But, prior to 2010, in 2009 you had
12 a conversation with Cheryl Webster of DEC regarding
13 this facility, didn't you?

14 A. Yes, I did.

15 Q. And you had a conversation with her -- she is
16 with the -- pardon me. She's with the air office
17 of DEC, correct?

18 A. That's correct.

19 Q. But she had been with the hazardous waste
20 section of DEC, correct?

21 A. No. She was with the solid waste.

22 Q. With the solid waste section before moving to
23 air enforcement, right.

24 A. Correct.

25 Q. And she had a conversation with you following

1 her April 2009 inspection at the Tonawanda Coke
2 facility, didn't she?

3 A. Correct.

4 Q. And do you recall what the subject matter of
5 that telephone conversation was?

6 A. That was a conversation related to whether K087
7 could be recycled.

8 Q. And do you recall approximately what date that
9 was?

10 A. Not exactly.

11 Q. Would June 1st of 2009 fit with your
12 recollection?

13 A. It's possible.

14 Q. All right. And do you recall telling
15 Miss Webster -- do you know why she called you? Do
16 you recall why she was seeking input from you about
17 this issue?

18 A. I believe she was trying to determine whether
19 that was a legitimate way to recycle K087 in
20 accordance with the RCRA regulation.

21 Q. Whether what was a legitimate way to recycle
22 K087?

23 A. Whether placing it back into the coke ovens.

24 Q. Placing it back into the coke ovens?

25 A. Right.

1 Q. I see. Did she tell you how the recycling was
2 being done?

3 MR. MANGO: Objection, your Honor. This
4 is getting into hearsay conversations. I let it go
5 a little bit, but now asking particularly did she
6 tell you this, that is hearsay, your Honor, in the
7 government's view.

8 MR. LINSIN: That question, your Honor, is
9 not seeking a statement for the truth of the
10 matter. It is a predicate question to what this
11 witness told Miss Webster.

12 THE COURT: All right. To that extent
13 I'll permit it. Overrule the objection.

14 BY MR. LINSIN:

15 Q. Do you recall what Miss Webster told you about
16 how K087 was being recycled at Tonawanda Coke?

17 A. I believe we went back and forth a couple of
18 times on this, and it came down to a question of
19 whether they were using the concrete pad to mix the
20 K087 with the coal. And as I recall, it was
21 somewhat confusing, but then ultimately I believe
22 we determined that the facility was mixing the K087
23 on the coal in the coalfield and not using the pad.

24 Q. All right. We'll get to the June 17th
25 inspection in just a minute. But going back to

1 your conversation with Miss Webster on June the 1st
2 of 2009, do you recall telling her, first of all,
3 that coal tar sludge is excluded as solid waste
4 under RCRA?

5 A. As long as it is managed within the confines of
6 the exclusion.

7 Q. Do you recall telling Miss Webster that it may
8 be appropriate to say that the waste codes, that is
9 the waste codes that relate to K087, apply once it
10 is managed? If it is removed from the old storage
11 area, it cannot be stored in any way that would
12 constitute land disposal. Do you recall telling
13 Miss Webster that?

14 A. That would sound correct.

15 Q. All right. So it can't be stored in a way that
16 constitutes land disposal, correct?

17 A. Correct.

18 Q. And "stored" is a term of art under RCRA,
19 correct?

20 A. Yes.

21 Q. And what is your understanding of what that
22 means under RCRA, to store a solid or hazardous
23 waste?

24 A. Storage would be that the -- the waste is in a
25 tank or container awaiting recycling or disposal.

1 MR. LINSIN: May I have just a moment,
2 your Honor?

3 BY MR. LINSIN:

4 Q. Does it fit with your memory, sir, that
5 "storage" under RCRA is defined as follows, to
6 mean: "The holding of a hazardous waste for a
7 temporary period, at the end of which the hazardous
8 waste is either treated, disposed, or stored
9 elsewhere."

10 Does that fit with your understanding?

11 A. Yes.

12 Q. All right. And you told Miss Webster on
13 June 1st of 2009 that these regs would apply if
14 this material was being stored in a way that
15 constituted land disposal, is that correct?

16 MR. MANGO: Your Honor, He was not certain
17 of the date. It seems a little unclear with the
18 question. That's Mr. Linsin's question, so, his
19 testimony was --

20 THE COURT: Fair enough. Let's get it --

21 MR. LINSIN: All right.

22 BY MR. LINSIN:

23 Q. I understand, sir -- and I don't mean to pin
24 you down to a date you're not certain about, but in
25 this conversation you've been testifying about with

1 Miss Webster in June of 2009, do you recall telling
2 her during that conversation that the regs would
3 apply to this material if it was being stored in
4 any way which would constitute land disposal?

5 A. I believe so.

6 Q. All right. Now, did you talk to Mr. Corbett?
7 He was -- you were Mr. Corbett's supervisor,
8 correct?

9 A. That's correct.

10 Q. Back in June of 2009, right?

11 A. That's correct.

12 Q. Did you talk to him about the plans for this
13 joint RCRA compliance inspection that occurred on
14 June the 17th of 2009 at Tonawanda Coke?

15 A. Yes, I did.

16 Q. Did you give him any instructions about what he
17 should be doing, what he should be looking for,
18 guidance as to how he should conduct this RCRA
19 compliance inspection?

20 A. Yes. In general terms, I indicated that, you
21 know, it's a joint inspection with EPA. EPA would
22 be the lead agency on the inspection, and that
23 there was a question as to -- there was a previous
24 question as to whether K087 was being recycled on
25 the concrete pad or not.

1 Q. All right. And so you specifically asked --
2 instructed him to determine how K087 was being
3 recycled at the Tonawanda Coke facility?

4 A. That's correct.

5 Q. And did you receive a report from Mr. Corbett
6 following his inspection?

7 A. A verbal report.

8 Q. Is it unusual that a DEC inspector would
9 accomplish a RCRA compliance inspection and not
10 submit a written report of that inspection?

11 A. In the instance where the EPA is the lead, we
12 would defer to them to generate the report.

13 Q. What did Mr. Corbett tell you about what he
14 learned at that facility during the
15 June 17th, 2009, inspection?

16 A. I believe he indicated that there was an issue
17 with the -- or was probably an issue with the
18 manner in which the K087 was being managed. And I
19 believe there was another issue related to the
20 disposal of lab chemicals.

21 Q. All right. Now, let's see if we can be clear
22 about this. When you're talking about the K087 in
23 the answer you just gave, are you talking about the
24 material that was being generated as a part of the
25 continuous production process at the facility, or

1 are you talking about material that was found in
2 these old storage tanks?

3 A. No, that was material that came from the
4 production process.

5 Q. Okay. And so you instructed him to find out
6 how they were doing this recycling?

7 A. That's correct.

8 Q. And what did Mr. Corbett report to you orally
9 after he inspected the facility?

10 A. I believe he indicated that Mr. Kamholz told
11 him that they were not using the pad to recycle the
12 K087.

13 Q. And how shortly after that inspection did
14 Mr. Corbett report this to you?

15 A. I believe it was a matter of days.

16 Q. And so did you immediately notify the company
17 that they were required to have a permit for this
18 activity that your inspector had identified as
19 ongoing at the facility?

20 A. No, I did not.

21 Q. And as a matter of fact -- well, I don't
22 know -- are you familiar with a 7003 order?

23 A. Seven -- Section 7003 order?

24 Q. Section 7003 order.

25 A. No.

1 Q. Under -- under -- it's an EPA authority under
2 RCRA. Are you familiar with that?

3 A. Not exactly, no.

4 Q. Does New York State under its regulations have
5 the ability -- short of a compliance action or
6 enforcement action, does New York State under its
7 own RCRA regulations have the ability to direct a
8 generator to mitigate or suspend an action that
9 they believe to be constituting a significant and
10 imminent hazard to the environment?

11 A. Based on a RCRA inspection, we would typically
12 advise them, before we left, that we think --
13 either that we know that there is a compliance
14 problem or there's possibly a compliance problem.

15 Q. And that would be as a matter of your normal,
16 your standard inspection protocol, correct?

17 A. Yes, for New York State.

18 Q. And -- but my question really went to a
19 different authority. Does New York State under its
20 regulations have the authority, short of an
21 enforcement action, to direct a generator or
22 handler to take certain actions to mitigate what
23 the inspector identified as a risk to the
24 environment?

25 A. Not that I'm aware of. I've only ever seen it

1 done in the context of an enforcement action.

2 Q. All right. You're familiar with the concept of
3 raw material under RCRA?

4 A. A raw material?

5 Q. Yes.

6 A. Yes.

7 Q. All right. And would you agree with me that
8 for a coke manufacturer raw -- that coal is a raw
9 material for that production process?

10 A. Yes, it is.

11 Q. And raw material is not regulated under RCRA,
12 correct?

13 A. No, it is not.

14 Q. It is not regulated under RCRA even if that raw
15 material sits out in the rain or snow or sleet,
16 correct?

17 A. That is correct.

18 Q. Are you aware of the composition of the
19 coalfield at the Tonawanda Coke facility?

20 A. No, I'm not.

21 Q. Do you know how deep the coal itself is
22 underneath the coal piles in that coalfield?

23 A. No, I do not.

24 Q. Would that affect your views about the
25 recycling process that was ongoing at Tonawanda

1 Coke -- let me rephrase the question, please.

2 Would it affect your view regarding the
3 recycling process at Tonawanda Coke if you
4 understood that the coal in this coalfield was
5 anywhere between 2 and 4 feet deep underneath the
6 coal piles themselves?

7 A. No, it would not.

8 Q. All right. Are you familiar with the concept
9 of a land-based production unit?

10 A. A land-based production unit or disposal?

11 Q. No, a land-based production unit.

12 A. No.

13 Q. Are you familiar with the revisions, the EPA
14 revisions, to the definition of solid waste that
15 came out in 2008?

16 A. Not off the top of my head.

17 Q. Do you recognize -- does it help refresh your
18 memory that in those revisions EPA addressed the
19 issue of manufacturers --

20 MR. MANGO: Objection, your Honor. It
21 seems like we're getting into EPA policy, guidance,
22 recommendations. That was kept out for a reason.
23 The Court is going to give very explicit
24 definitions of what solid waste is, hazardous
25 waste, storage disposal, land disposal. This

1 doesn't seem relevant at this point, your Honor.

2 THE COURT: Is that where you're going,
3 Mr. Linsin?

4 MR. LINSIN: Your Honor, I'm asking
5 regarding this concept of a land-based production
6 unit and how EPA has applied that concept to other
7 industries that produce products on the ground,
8 such as the mining industry, which I believe is
9 directly relevant to this witness -- foundation
10 upon which this witness's opinions are based.

11 MR. MANGO: Which my understanding, my
12 notes, your Honor, is that he's unfamiliar with the
13 term "land-based production unit." So --

14 THE COURT: I think that's right. I think
15 that was your testimony. Is that right?

16 THE WITNESS: That is correct, your Honor.

17 THE COURT: Okay. Then I'll sustain the
18 objection.

19 BY MR. LINSIN:

20 Q. Do you know when -- are you aware that there
21 was a concrete pad, a walled concrete pad, in the
22 coalfield at the Tonawanda Coke facility?

23 A. Yes, I am.

24 Q. Do you know when that concrete pad was
25 constructed?

1 A. I believe it was designed and constructed in
2 1994.

3 Q. And that would be five years after DEC's first
4 inspection, first RCRA compliance inspection, of
5 this facility, correct?

6 A. That's correct.

7 Q. You testified a little bit earlier on
8 cross-examination that you were aware of the
9 factual stipulation regarding the materials in
10 these two old storage tanks, correct?

11 A. That's correct.

12 Q. And do you recognize that on the basis of that
13 stipulation there's an agreement that the materials
14 inside -- that had been inside those tanks had been
15 abandoned by a prior owner of the facility?

16 A. Yes, that's correct.

17 Q. And are you also aware that some of the
18 material that had been inside those tanks had
19 actually spread out onto the ground in the area of
20 the tanks?

21 A. Yes, that's correct.

22 Q. Now, do you have an opinion about the
23 application of RCRA to those previously abandoned
24 wastes from a prior owner?

25 A. I'm not following the question.

1 Q. When Tonawanda Coke acquired the facility in
2 1978, did RCRA apply to those previously abandoned
3 wastes?

4 A. In 1978?

5 Q. Yes, sir.

6 A. RCRA did not exist at the time.

7 Q. All right. Did it apply once RCRA was enacted?

8 A. Yes, it would.

9 Q. And what is your analysis of RCRA that would
10 apply RCRA to those previously abandoned wastes?

11 A. Because once RCRA came into being, they would
12 have qualified as wastes, so that once 1980 passed,
13 that those -- the waste codes would apply to that
14 waste if it was managed in any way.

15 Q. Oh. So RCRA would apply to those previously
16 abandoned wastes if and only if those previously
17 abandoned wastes were actively managed, is that
18 correct?

19 A. That's correct.

20 Q. And do you have any understanding of the facts
21 in this case that indicate that Tonawanda Coke had
22 actively managed that material?

23 A. I believe they spilled some during the
24 demolition of the tanks.

25 Q. You believe?

1 A. I believe so.

2 Q. When did that occur?

3 A. I believe it was in -- somewhere around the
4 2008 time frame.

5 Q. So, according to your analysis, if I understand
6 you correctly, RCRA wouldn't have applied to that
7 material inside the tanks until it had been spilled
8 when the tanks were dismantled, is that correct?

9 A. That's correct.

10 Q. All right. So RCRA wouldn't have applied
11 before then?

12 A. No.

13 Q. Okay. Now, I'd like to ask you this
14 hypothetical question, if I may, Mr. Strickland:
15 If a coke manufacturer notified EPA in 1986 that it
16 was generating K087 waste, and then again informed
17 EPA two years later that it was generating more
18 than a thousand kilograms of K087 every month, and
19 then the DEC RCRA compliance inspectors inspected
20 that facility at least four separate times over a
21 20-year period and each time confirmed that that
22 facility was a small-quantity generator, never told
23 that facility that it needed to apply for a RCRA
24 permit or change its recycling practices, wouldn't
25 it be reasonable for that facility to conclude that

1 the regulatory agency had approved of the recycling
2 practice that had been ongoing from 1986 until the
3 end of that period of inspection?

4 MR. MANGO: Your Honor, I hate to object.
5 It was a long question. But I didn't quite follow
6 it, and asking him whether it would be reasonable
7 for a regulated industry to believe something, I
8 don't think we have that foundation here for this
9 witness to say what a facility -- what would be
10 reasonable for a facility to believe. That's
11 almost the ultimate question at issue here, and I
12 don't think it's an appropriate question.

13 THE COURT: All right. Do you remember
14 the question?

15 THE WITNESS: Not exactly.

16 THE COURT: All right. Which is
17 problematic, but is that calling for the ultimate
18 conclusion here?

19 MR. LINSIN: Your Honor, I'm asking --
20 given the oversight responsibilities that this
21 witness has had and the direct responsibilities
22 that he's had with respect to the RCRA compliance
23 inspectors that engaged with this facility, I'm
24 asking whether or not, given that regulatory
25 framework, it is reasonable for the facility to

1 understand that these practices were being approved
2 of. I recognize that it is a -- he has been
3 offered as an expert to render opinions in this
4 area regarding requirements for permitting or not.
5 I realize it touches on areas that will be ultimate
6 issues, but I don't believe -- I believe it is a
7 reasonable question.

8 THE COURT: Yeah, I think it's a
9 reasonable question, but I don't think it's
10 permissible in the way that it was presented,
11 because you are asking for a conclusion with
12 respect to what the provider was -- whether it
13 would be reasonable for it to conclude or not. And
14 I think, in that fashion, based on the facts, it's
15 an impermissible question, so I'll sustain the
16 objection.

17 MR. LINSIN: All right. Let me change the
18 hypothetical, if I may, then, just slightly.

19 BY MR. LINSIN:

20 Q. I'll try to go back through this. I apologize
21 for the length of the question, but if it's not
22 clear at the end of this effort, please just let me
23 know.

24 Let me ask it this way: Isn't it reasonable --
25 looking back over the regulatory oversight that DEC

1 exercised over the Tonawanda Coke facility, isn't
2 it reasonable to recognize that your agency and the
3 inspectors you supervised, time and again, on at
4 least four separate occasions, concluded that there
5 was no need for this facility to have a RCRA permit
6 for the recycling activities in which they were
7 engaged? Isn't that a reasonable conclusion?

8 A. That would be based on the inspectors'
9 observations of the activities. They -- it's quite
10 possible that they may have gone to the facility
11 and not seen the recycling process and exactly how
12 it was done, so they may not have understood fully
13 where the material was being mixed with the coal.

14 Q. For that possibility to have been true, your
15 RCRA compliance inspectors on four separate
16 occasions over 20 years would have had to ignore
17 what you described as the general practice for an
18 inspector to both speak with the operator and view
19 the operation of the activities, correct?

20 MR. MANGO: I'm going object.

21 THE COURT: I'll permit that question.
22 Overruled. You may answer if you understand it.

23 THE WITNESS: Could you repeat the
24 question, please?

25 BY MR. LINSIN:

1 Q. Sure. You said it's possible that these RCRA
2 inspectors that you supervised -- it's possible
3 they may not have viewed the recycling activity.
4 Is that how I understood your previous question?

5 A. That's correct.

6 Q. And my question now is: In order for that
7 possibility to be true, your RCRA compliance
8 inspectors or the RCRA compliance inspectors from
9 your office, some of whom you directly supervised
10 during this interval, they would have had to have
11 ignored what you described as the general practice
12 for RCRA compliance inspectors, when they conduct a
13 RCRA compliance inspection, to both speak to the
14 operator and observe the activities in question,
15 isn't that true?

16 A. The inspections end up becoming a snapshot of
17 what's happening at the facility at the time of the
18 inspection. It's quite possible that certain
19 activities are not occurring at any facility when
20 the inspectors go there. And they could say, fine,
21 you know, I don't see any problems, but the next
22 day, you know, there could be compliance issues.
23 So I guess they would have to see the activity or
24 be informed of the activity.

25 Q. In order for a RCRA compliance inspector to

1 determine that the facility does not need a permit,
2 that it is, in fact, properly operating as a
3 small-quantity generator, that RCRA compliance
4 inspector has to satisfy him or herself that the
5 recycling activities are being done appropriately,
6 correct?

7 A. Only if they were aware of how they were -- if
8 the activity was occurring while they were there or
9 they were informed by the operator --

10 Q. Mr. Strickland --

11 A. -- that there is or is not a problem.

12 Q. Isn't it their job to understand what those
13 recycling activities are?

14 A. Yes, they should.

15 MR. LINSIN: I have nothing further, your
16 Honor. Thank you.

17 THE COURT: Okay, Mr. Linsin. Thank you.

18 MR. PERSONIUS: May I, Judge?

19 THE COURT: Certainly.

20 MR. PERSONIUS: May I start?

21 THE COURT: Yes, you may.

22 CROSS-EXAMINATION BY MR. PERSONIUS:

23 Q. Good afternoon, Mr. Strickland.

24 A. Good afternoon.

25 Q. My name is Rod Personius, and I represent Mark

1 Kamholz.

2 Following up on Mr. Linsin's question about the
3 inspectors being at Tonawanda Coke, it's true, is
4 it not, that those inspectors had the absolute
5 authority to require Mr. Kamholz or whomever they
6 dealt with to show them exactly how the recycling
7 activity was taking place?

8 A. Yes, they could.

9 Q. They could. If -- they had the complete
10 authority to -- if they didn't see it, they had the
11 complete authority to ask to see it, right?

12 A. They could have asked.

13 Q. You testified about information you received
14 regarding recycling activities at Tonawanda Coke
15 from Cheryl Webster.

16 A. Yes.

17 Q. We don't know the exact date, but I think you
18 agreed it was in and around June of 2009?

19 A. That would seem correct.

20 Q. Okay. And it was based on information that
21 Miss Webster had obtained during an earlier air
22 inspection at Tonawanda Coke?

23 A. Correct.

24 Q. And is it correct in understanding that the
25 source of the information that she provided to you

1 was Mr. Kamholz?

2 A. I believe some of it was from Mr. Kamholz.

3 Q. During the air inspection?

4 A. Right.

5 Q. All right. And the information you got from
6 Mr. Corbett following the inspection that took
7 place in June of 2009 at Tonawanda Coke, again the
8 source of that information was Mr. Kamholz?

9 A. Regarding the K087, yes.

10 Q. Okay. And there was a later either inspection
11 or sampling activity that occurred at Tonawanda
12 Coke in September?

13 A. That's correct.

14 Q. Of 2009?

15 A. Right.

16 Q. Okay. And additional information about those
17 recycling activities was learned at that time by
18 Mr. Corbett?

19 A. I believe it was the same information.

20 Q. Okay. And -- and the source again of that
21 information was Mr. Kamholz?

22 A. That's correct.

23 MR. PERSONIUS: Okay. May I have a
24 minute, Judge?

25 THE COURT: Sure.

1 MR. PERSONIUS: Your Honor, that's all we
2 have.

3 Thank you, Mr. Strickland.

4 THE WITNESS: You're welcome.

5 THE COURT: Mr. Mango?

6 MR. MANGO: Your Honor, thank you.

7 REDIRECT EXAMINATION BY MR. MANGO:

8 Q. Good afternoon, Mr. Strickland.

9 A. Good afternoon.

10 Q. You were asked on cross-examination about an
11 EPA notice, I believe, back in 1986, those 1986
12 notifications and a later notification regarding
13 notifying the EPA as to certain hazardous waste
14 activities that were occurring.

15 A. That's correct.

16 Q. All right. In fact, does RCRA require
17 facilities to identify if they are generating
18 hazardous wastes?

19 A. Yes, it does.

20 Q. And does RCRA also require that a facility go
21 out and obtain this generator ID number that we've
22 been talking about?

23 A. Yes, it does.

24 MR. MANGO: Okay. I'd like pull up, your
25 Honor, in evidence, Sheila, please, Defendant's

1 Exhibit B. If we could scroll through the pages
2 until we hit I-2 at the bottom. Yes. Right there.
3 Thank you.

4 BY MR. MANGO:

5 Q. Mr. Strickland, do you see this document on
6 your screen?

7 A. Yes, I do.

8 Q. Okay. And this information is now zoomed up.
9 There was this question in D as to if the facility
10 is a treatment, storage, or disposal facility, and
11 if they have, and it's checked all not applicable,
12 is that correct?

13 A. That's correct.

14 Q. Who would have given Mr. Fisher this
15 information to put not applicable here?

16 A. That quite possibly could be the facility.

17 MR. LINSIN: Objection to possibilities,
18 your Honor.

19 THE COURT: Yeah. Sustained.

20 MR. LINSIN: I would move the answer be
21 struck.

22 THE COURT: Okay. And I'll grant that
23 motion to strike the answer. It should not be
24 considered, ladies and gentlemen, as any evidence
25 for your consideration purposes.

1 BY MR. MANGO:

2 Q. Let's start again. Mr. Strickland, are you
3 familiar with Mr. Fisher's work?

4 A. Yes, I am.

5 Q. During -- and is that fair to say that during
6 the time you supervised him you reviewed a number
7 of his inspection reports?

8 A. I would normally only review an inspection
9 report if there was a serious violation and it was
10 going to proceed to formal enforcement. Typically
11 the inspection reports would be -- I would assign
12 another inspector to review the inspection reports
13 generated by any of the inspectors. They -- that
14 report would then go to our Albany office and would
15 be reviewed by another individual in the RCRA
16 inspection program.

17 Q. Okay. But is it fair to say that in the course
18 of your duties you've reviewed some of Mr. Fisher's
19 work?

20 A. Yes.

21 Q. And are you familiar with whether he was an
22 avid note taker or not an avid note taker?

23 A. He was known to be a very avid note taker.

24 Q. Okay. So, if, for example, Mr. Fisher had
25 actually seen the process of recycling K087 --

1 MR. LINSIN: Objection to hypotheticals.
2 The witness has already said he did not speak to
3 Mr. Fisher about this inspection report.

4 MR. MANGO: Your Honor, I'm not asking him
5 about whether he spoke to him. I'm asking about in
6 his experience of reviewing his work. That is the
7 basis of the question.

8 MR. PERSONIUS: But you're -- if I may add
9 something, Judge. The witness has testified that
10 as a rule he did not review Mr. Fisher's inspection
11 reports. There's no foundation.

12 THE COURT: Yeah, unless there was a
13 compliance issue. I'll sustain the objection.

14 MR. MANGO: Okay.

15 BY MR. MANGO:

16 Q. Well, did there come a time when you did review
17 Mr. Fisher's work?

18 A. Yes, I have looked at his inspection reports.

19 Q. Okay. And -- and you mentioned -- I believe on
20 cross you were asked whether it was their job to
21 understand the recycling process that was happening
22 at the facilities they inspected. Do you remember
23 that?

24 A. Yes.

25 Q. Okay. And in part in answering that question,

1 I believe you said part of understanding -- part of
2 their understanding of this recycling process is
3 relying on facility representatives to give them
4 that information.

5 A. That's correct.

6 Q. Is that right?

7 A. That's correct.

8 Q. And the other basis would be to actually see
9 the process.

10 A. That is correct.

11 Q. Based on your review of Mr. Fisher's notes and
12 inspection report, do you believe Mr. Fisher saw
13 the process?

14 MR. LINSIN: Objection.

15 THE COURT: Sustained.

16 BY MR. MANGO:

17 Q. Let me ask you this: If Mr. Fisher would have
18 seen the recycling process, would he have described
19 that in his inspection report?

20 MR. LINSIN: Objection, your Honor.

21 THE COURT: Sustained.

22 BY MR. MANGO:

23 Q. Okay. If we can back out of this, please,
24 Sheila. If we could go to page I-4. Thank you.

25 Okay. Mr. Strickland, do you see this section

1 on your screen here?

2 A. Yes, I do.

3 Q. Treatment, storage, or disposal facility
4 status. Is hazardous waste generated and stored
5 on-site, is that right?

6 A. Correct.

7 Q. Okay. There's specific answers in here. No,
8 no, and no, for A, B, and C. Is that right?

9 A. That's correct.

10 Q. Based on your understanding of inspections at
11 small-quantity generators, how did this information
12 arrive on this form?

13 THE COURT: If you know.

14 THE WITNESS: It would probably be --

15 MR. PERSONIUS: Objection to probably,
16 your Honor. Sorry to interrupt.

17 THE COURT: Sustained.

18 BY MR. MANGO:

19 Q. Let me ask you. Do you know? Without saying
20 probably, do you know?

21 A. No, I don't.

22 Q. Let me ask you this: During an inspection, if
23 hazardous waste was being stored on-site for longer
24 than 90 days, is that something, in your
25 experience, that -- as head of the RCRA section

1 from 1994 to 2010, is that something you would
2 expect a facility manager to bring to the
3 inspector's attention?

4 A. Yes.

5 Q. Okay. Now, you were asked about the previous
6 EPA notification and the fact that it was checked
7 that they were generating more than 1,000 --
8 1,000 pounds, I believe.

9 A. I believe it was 1,000 kilos.

10 Q. 1,000 kilos of waste, is that right?

11 A. That's correct.

12 Q. And you were asked that if there is an
13 exemption, that material is not considered a
14 hazardous waste for, say, K087, is that right?

15 A. Correct. It would be excluded.

16 Q. Okay. But to obtain that exemption,
17 specifically for K087, what needs to be done?

18 A. I'm not following the question.

19 Q. How does a facility have to handle their K087
20 waste to be entitled to that exemption?

21 MR. LINSIN: Your Honor, may I, please?

22 The -- I'm not clear, first of all, what exemption
23 we're talking about, and some of the exemptions
24 change dramatically during the time frame that
25 these questions range over. So I just ask for a

1 time frame and specifically identify what exemption
2 or exclusion the question relates to.

3 MR. MANGO: I will, your Honor.

4 THE COURT: Okay. Mr. Mango.

5 BY MR. MANGO:

6 Q. Let's go at it this way, Mr. Strickland. You
7 testified that in 1994 you believe this concrete
8 pad was installed?

9 A. That's correct.

10 Q. Are you familiar or do you know if anything
11 happened in 1992 relating to K087 waste?

12 A. There was -- essentially, the exclusion came
13 into being for the K087 recycling, and there was
14 some guidance from EPA related to how facilities
15 could manage the K087 and several other K08's from
16 the coke by-products process and avoid the issue of
17 land disposal.

18 Q. Okay. So in 1992 this guidance comes out, and
19 is it fair to say it said the material --

20 MR. LINSIN: Objection.

21 THE COURT: I'm sorry. Go ahead.

22 MR. LINSIN: Objection, your Honor. If we
23 are going down the guidance, this directly relates
24 to the Court's pretrial order with respect to land
25 disposal.

1 THE COURT: Mr. Mango, try again.

2 MR. MANGO: Yes, your Honor. Your Honor,
3 I was trying to set the stage for the question
4 before.

5 BY MR. MANGO:

6 Q. Let's start in 1994. There was an objection
7 regarding a time frame to a question. In 1994 if a
8 company says that they have an exemption for K087
9 waste, what do they need to do to maintain that
10 exemption?

11 A. Essentially, they have to recycle the K087 back
12 into the coke -- coking process, without having
13 land-disposed of the waste at any time from the
14 point of generation to the point of recycling.

15 Q. Okay. Now, you talked about -- during direct
16 testimony and briefly on cross-examination, about
17 storage and disposal, and it's your understanding
18 that Count 19 relates to the placement of K087
19 waste on coal piles on the ground, is that right?

20 A. That's correct.

21 Q. Okay. And you were asked specifically about a
22 definition of "storage." I want to ask you about a
23 definition of "disposal." Is it your understanding
24 that under the regulations in RCRA disposal means
25 the abandonment, discharge, deposit, injection,

1 dumping, spilling, leaking, or placing any solid
2 waste, including hazardous waste, into or onto any
3 lands or waters? Is that your understanding of
4 disposal?

5 A. That's correct.

6 Q. So would your -- would the placement of K087
7 waste onto coal situated on the ground constitute
8 disposal under that definition?

9 A. Yes, it would.

10 Q. Let me ask you this: If a raw material such as
11 coal is situated on the ground -- which you said is
12 not regulated under RCRA, right?

13 A. That's correct.

14 Q. Okay. But that raw material is mixed in with
15 some hazardous waste and then is put on the ground,
16 is that raw material and hazardous waste mixture
17 regulated under RCRA?

18 A. Yes. It would be a hazardous waste.

19 Q. All right. Let me ask you this: You were
20 asked about the June of 2009 inspection and some
21 information that you learned from Mr. Corbett?

22 A. Yes.

23 Q. Okay. Why did you not tell the Tonawanda Coke
24 Corporation that they were in violation of RCRA or
25 believed to be in violation of RCRA relating to

1 their handling of K087 waste after that inspection?

2 A. Because we were not the lead in the inspection.

3 Q. Okay. I'd like to pull up Defendant's DDDD.01
4 please, Sheila.

5 Now, remember that conversation we just had
6 about disposal, Mr. Strickland?

7 A. Yes.

8 Q. Okay. I'd like to go to the second page of
9 this document. This is in evidence, yes.
10 Actually, if we could go to the first page. I'd
11 just like to get a date.

12 This is the 1988 notice. You see that at the
13 bottom, Mr. Strickland?

14 A. Yes, I do.

15 Q. Okay. So let's go to the next page, please.
16 If we could zoom in this bottom part.

17 You remember being asked about the comments on
18 this 1988 notice?

19 A. Yes, I do.

20 Q. Okay. In reading this, "After recycling, there
21 is no waste material of any kind to be disposed of
22 in any manner." See that word "disposed"?

23 A. Yes.

24 Q. Okay. We just talked about that. By reading
25 this, would you -- would it be fair to believe that

1 Tonawanda Coke is telling EPA we're taking K087
2 waste and we are putting it on coal on the ground?

3 A. It does indicate disposal -- or it does have
4 the word "disposed" on there.

5 Q. But it says "no waste material of any kind to
6 be disposed." Is that right?

7 A. That is correct.

8 Q. Okay. So is it fair to say that EPA was not
9 told in this that they're taking the K087 waste and
10 putting it on coal on the ground?

11 A. I would believe that to be correct.

12 MR. MANGO: Your Honor, if I could have
13 one moment, please.

14 THE COURT: Yes.

15 BY MR. MANGO:

16 Q. Mr. Strickland -- we can take that down. Thank
17 you, Sheila.

18 When a RCRA inspector conducts a small-quantity
19 generator inspection, is there any type of
20 checklist of questions that is brought to the
21 facility at that time?

22 A. Typically they would bring the RCRA inspection
23 form.

24 Q. Those documents we were looking at?

25 A. Correct.

1 Q. And does the RCRA inspector then ask the
2 questions on that form to the facility
3 representative?

4 A. Yes. Any of the sections that would be
5 applicable.

6 Q. And does the RCRA inspector then use the
7 answers from the facility representative to fill in
8 the answers on that inspection form?

9 A. Yes, in addition to their observations.

10 Q. Is there any indication in Mr. Fisher's report
11 that he observed where the recycling was happening?

12 A. I see no indication.

13 Q. Based on your experience, Mr. Strickland, of
14 managing the RCRA program from 1984 to 2010 and
15 reviewing inspection reports, is it usual for the
16 answers to the questions of a small-quantity
17 generator inspection to be based solely upon
18 information supplied by the facility?

19 MR. LINSIN: Objection. Asked and
20 answered.

21 MR. MANGO: Your Honor, this is a little
22 different, and this is my last question to the
23 witness.

24 THE COURT: All right. Why don't you --
25 that's your objection? Asked and answered?

1 MR. LINSIN: Yes, it is.

2 THE COURT: All right.

3 MR. PERSONIUS: I object also, Judge. I
4 think it's leading, on top of it.

5 THE COURT: No. But reask the question
6 again, please.

7 MR. MANGO: Yes, your Honor.

8 BY MR. MANGO:

9 Q. Mr. Strickland, based on your experience of
10 running the RCRA Region 9 office from 1994 to 2010,
11 reviewing inspection reports, your understanding of
12 what goes into a small-quantity generator
13 inspection, is it usual for the answers of the
14 questions of a small-quantity generator inspection
15 to be based solely on information supplied by the
16 facility?

17 A. Solely, no.

18 Q. Okay. Does that -- did that happen any time
19 that you were aware of?

20 MR. LINSIN: Objection, your Honor.

21 THE COURT: If what happens?

22 MR. MANGO: Were there instances where the
23 small-quantity generator inspection report was
24 based solely on information provided by the
25 facility representative if the actual process was

1 not occurring at the time the facility or the
2 inspector was there?

3 THE COURT: All right. There is an
4 objection. I'll sustain the objection.

5 MR. LINSIN: Thank you.

6 MR. MANGO: Nothing further, your Honor.

7 THE COURT: Okay, Mr. Mango.

8 MR. MANGO: Thank you.

9 THE COURT: Sure.

10 MR. LINSIN: Just very briefly, please,
11 your Honor.

12 THE COURT: Okay.

13 RECROSS EXAMINATION BY MR. LINSIN:

14 Q. May I please have Defendant's DDDD.01 in
15 evidence. And going to page 2 of this exhibit,
16 please.

17 Mr. Strickland, if I heard you correctly, you
18 testified that when a DEC RCRA compliance inspector
19 goes to a facility, especially for the first time,
20 they would typically bring with them the EPA form
21 which had resulted in the generator ID number. Is
22 that what you testified to?

23 A. No. I think I testified to the fact that they
24 would normally bring the -- an inspection report,
25 our DEC inspection report.

1 Q. I'm sorry. The RCRA inspection form. You
2 don't mean the EPA RCRA inspection form, is that
3 what you're saying?

4 A. No, it would be the New York State.

5 Q. But the -- you see in here -- we went through
6 it again -- that the facility had reported in 1998,
7 the year before your inspection, the first DEC
8 inspection, that it was generating more than a
9 thousand kilos per month, correct?

10 A. Yes. That's how it's marked.

11 Q. Lets bring this down, please.

12 And based on your review of the DEC file, your
13 inspectors confirmed on four separate occasions
14 from '89 to 2009 that this facility qualified as a
15 small-quantity generator, correct?

16 A. That's correct.

17 Q. And what's the number to qualify, the weight
18 number, volume number of hazardous material
19 generated for a small-quantity generator?

20 A. A small-quantity generator generates between a
21 hundred and a thousand kilos in any one month
22 during the calendar year.

23 Q. And so you -- you testified a moment ago that
24 it was your understanding that a -- even a
25 moderate-size coke manufacturer is going to

1 generate approximately a ton of K087 per month,
2 correct?

3 A. Yes, I did.

4 Q. And that would greatly exceed the limitations
5 for a small-quantity generator, correct?

6 A. A thousand kilos would be 2,200 pounds,
7 roughly.

8 Q. All right. So your inspectors had to determine
9 that something else was being done with this K087
10 material, correct?

11 A. Yes. They noted that this was being recycled
12 in accordance with the exclusion.

13 Q. And there is a reason, isn't there,
14 Mr. Strickland, why RCRA compliance inspections are
15 conducted on-site? Isn't there?

16 A. Yes, there is.

17 Q. If -- especially for an initial RCRA compliance
18 inspection, isn't it critical for the RCRA
19 compliance inspector to determine whether or not
20 this is a large-quantity generator or a
21 small-quantity generator?

22 A. Yes.

23 Q. And if it were otherwise, somebody could just
24 call the facility and go through a checklist and
25 say, hey, they told us this is what they're doing,

1 and that's good enough for us. Right?

2 A. Right. But we would not do that.

3 Q. No, you wouldn't, because it's important for
4 your inspectors to get out on-site, correct?

5 A. That is correct.

6 Q. And review site-specific information about how
7 that facility is managing and handling their
8 hazardous waste, correct?

9 A. That is the intent of the inspection.

10 Q. And that's their job, right?

11 A. Correct.

12 Q. And that's the training you talked about having
13 received yourself, correct?

14 A. Correct.

15 MR. LINSIN: I have nothing further, your
16 Honor. Thank you.

17 MR. PERSONIUS: Your Honor, I have nothing
18 further.

19 THE COURT: All right, Mr. Personius.
20 Thank you.

21 MR. MANGO: One question, your Honor,
22 based on that line of -- last line of questioning.

23 FURTHER REDIRECT EXAMINATION BY MR. MANGO:

24 Q. Mr. Strickland, is it unusual that an inspector
25 not observe the recycling process during a

1 small-quantity generator inspection?

2 A. Excuse me?

3 Q. Is it unusual that an inspector not observe the
4 recycling process during a small-quantity generator
5 inspection?

6 A. If the process is not going on while they're
7 there, yes, they would not observe it.

8 MR. MANGO: Thank you. Nothing else, your
9 Honor.

10 MR. LINSIN: Nothing, your Honor. Thank
11 you.

12 MR. MANGO: I guess, subject to any
13 questions of the jury, your Honor, we have nothing
14 else.

15 THE COURT: Yes. Ask the jury if there
16 are any questions that you have on your written
17 forms, if you would raise your hands, we can pick
18 those up if there are any.

19 Okay. It does not appear that there are.

20 Mr. Strickland, you are excused. Thank you
21 very much.

22 THE WITNESS: Thank you, your Honor.

23 MR. MANGO: Your Honor, the government
24 would call Robert Conway.

25 THE COURT: Okay. Mr. Conway, I think you

1 know the drill, so stay right there. We'll have
2 you sworn.

3 R O B E R T C O N W A Y, having been duly sworn as
4 a witness, testified as follows:

5 THE COURT: Okay. Good afternoon,
6 Mr. Conway.

7 THE WITNESS: Good afternoon, your Honor.

8 THE COURT: You know the instructions. Be
9 as responsive as you can. If you don't understand
10 a question, let the attorney or myself know,
11 whoever the questioner is. If you can answer a
12 question yes or no, please try to do it that way.
13 Don't volunteer information.

14 If there's an objection, let me rule on the
15 objection, then I will give you further
16 instructions. Okay?

17 THE WITNESS: Okay.

18 THE COURT: All right. I think you're
19 going to carry okay, but state your full name,
20 spell your last name, please.

21 THE WITNESS: My name is Robert Conway.
22 C-O-N-W-A-Y.

23 THE COURT: Okay. Thank you. Your
24 witness, Mr. Mango.

25 MR. MANGO: Thank you, your Honor.

1 DIRECT EXAMINATION BY MR. MANGO:

2 Q. Good afternoon, Mr. Conway.

3 A. Good afternoon, Mr. Mango.

4 Q. We've talked about this a couple of times, but
5 if you could tell the jury, are you currently
6 employed?

7 A. Yes, I am. I'm employed as a special agent
8 with the United States Environmental Protection
9 Agency's Criminal Investigation Division, and I'm
10 stationed out of Syracuse, New York.

11 Q. Okay. And how long have you been a special
12 agent with EPA?

13 A. I've been a special agent with the EPA CID for
14 about three and a half years.

15 Q. Okay. And that's -- CID is the Criminal
16 Investigation Division?

17 A. Correct.

18 Q. All right. Can you tell the jury what your
19 duties are as a special agent with EPA CID?

20 A. My duties as a special agent are to investigate
21 complaints of potential criminal activity related
22 to the Environmental Protection Agency's laws and
23 regulations, particularly the Clean Air Act, the
24 Clean Water Act, the Resource Conservation and
25 Recovery Act, which is the hazardous waste laws,

1 and there's some other -- other specialized laws as
2 well. But the three major ones are the Clean Air
3 Act, Clean Water Act, and RCRA.

4 Q. Prior to your start with EPA CID, did you hold
5 any other type of federal law enforcement
6 positions?

7 A. Yes, I did. I had worked for 15 --
8 approximately 15 years as a seasonal and a
9 permanent law enforcement park ranger for the
10 National Park Service.

11 Q. Okay. Now, I'd like to ask you a question.
12 Have you been present, Mr. -- or Special Agent
13 Conway, during the testimony of all the witnesses
14 in this trial?

15 A. Yes, I have.

16 Q. And have you been present during the
17 introduction of all exhibits into evidence in this
18 trial?

19 A. Yes, I have.

20 Q. And based on those exhibits that have been
21 introduced, have you conducted any type of review
22 of those exhibits?

23 A. Yes, I have.

24 Q. Okay. Can you tell the jury what was the
25 purpose of your review of some of those exhibits?

1 A. The purpose was to prepare summary charts to
2 assist the jury in understanding some of the
3 lengthy exhibits that have been entered as evidence
4 into the case.

5 Q. Okay. And if you could just briefly, in
6 general terms, tell the jury what type of summary
7 charts you have prepared -- have you prepared any
8 summary charts?

9 A. Yes, I have.

10 Q. Okay. Can you tell the jury what type of
11 summary charts you've prepared?

12 A. I've prepared two summary charts. The first is
13 a summary of the by-products operator logbooks, and
14 the second summary is a summary of the circular
15 bleeder chart documents that have been discussed at
16 great length in this case.

17 Q. Okay. So let's start with the operator --
18 by-products operator logbook. You mentioned that
19 was one of your summaries that you've made?

20 A. Correct.

21 Q. Are you familiar with Exhibits 82 to 89 that
22 have been introduced in this trial?

23 A. Yes. They are the by-products operator
24 logbooks, where the by-products operators every two
25 hours go around and do inspections and they note

1 what they did during those -- those rounds around
2 the by-products department.

3 Q. Okay. Those Exhibits 82 to 89, did you read
4 all of those exhibits?

5 A. Yes, I did.

6 Q. And approximately how many pages are all of
7 those exhibits?

8 A. I would say approximately over -- well over a
9 thousand pages.

10 Q. All right. Do you know what time periods the
11 Government Exhibits 82 to 89 cover?

12 A. They cover a time period of August 17th, 2006,
13 through December 17th, 2009.

14 Q. And December 17th, 2009, is there any -- does
15 that date have any meaning to you as part of this
16 case?

17 A. Yes, it does. That's the day the criminal
18 search warrant was executed at the Tonawanda Coke
19 Corporation.

20 Q. Okay. So you did say you read through those
21 documents. And what, if anything, did you do when
22 you read through those documents, Exhibits 82 to
23 89?

24 A. What I was looking for was references to the --
25 the pressure-relief valve or the bleeder valve.

1 Particularly, I was looking for where adjustments
2 to the set release point were noted in those
3 logbooks. In addition, in the summary chart I
4 noted where there was one incident noted in the
5 logbook of the bleeder valve or the PRV catching on
6 fire via a lightning strike.

7 Q. Okay. So you noted that in the log -- or in
8 the summary?

9 A. Yes.

10 THE COURT: Ask the question again,
11 please.

12 BY MR. MANGO:

13 Q. Yes. So you noted the lightning strike in your
14 summary exhibit?

15 A. Yes. That's the only one that will not have a
16 set release change value for the pressure-release
17 valve set point.

18 Q. Okay. So I'd like to show you for
19 identification purposes now, your Honor, Government
20 Exhibit 200. Not in evidence, for identification
21 purposes.

22 Special Agent Conway, do you see Government
23 Exhibit 200 on your screen?

24 A. Yes, I do.

25 Q. And if you could tell the jury, what is this

1 document?

2 A. This is the document -- this is my summary of
3 the -- my review of the by-products operator
4 logbooks. It notes the date of the entry in the
5 logbook; it notes the set release point for the
6 bleeder valve or the pressure-release valve; it
7 notes the by-products operator logbook date,
8 because each logbook has set dates, a beginning
9 date and an end date. The next is the government
10 exhibit and the page number that's in reference to
11 the government exhibit that was entered into
12 evidence, and the specific page number within that
13 government exhibit where you can find the
14 reference. And then the last is any relevant
15 comments related to the entry into the logbook.

16 Q. All right. Did you make this document that's
17 on your screen?

18 A. Yes, I did.

19 Q. And for the items you just mentioned, the
20 information that it contains -- the date, the
21 bleeder setting, set point, the logbook date range,
22 the government exhibit and page number, and the
23 comments -- does Government Exhibit 200 that you're
24 looking at fairly and accurately summarize that
25 information from the logbooks onto your summary

1 chart here?

2 A. Yes, it does.

3 MR. MANGO: Your Honor, based on the
4 testimony of this witness and Federal Rule of
5 Evidence 1006, the government would move Government
6 Exhibit 200 into evidence.

7 THE COURT: Mr. Personius?

8 MR. PERSONIUS: We note our prior
9 objection, Judge, and stand by that.

10 THE COURT: Mr. Linsin as well?

11 MR. LINSIN: Yes, your Honor, and
12 acknowledge the Court's ruling.

13 THE COURT: Okay. Thank you. And the
14 objections will be overruled. I will permit it for
15 the reasons previously discussed.

16 (Government's Exhibit 200 was received
17 into evidence.)

18 THE COURT: You may proceed, Mr. Mango.

19 MR. MANGO: Thank you, your Honor. And I
20 would ask that Government Exhibit 200 now be
21 admitted into evidence and published for the jury.

22 THE COURT: Yes, you may do that.

23 BY MR. MANGO:

24 Q. All right, Special Agent Conway, can you again
25 now, with respect to what is on our screens,

1 explain for the jury what we're looking at?

2 A. Yes. Again, on the left-hand side is the date
3 of the entry in the by-products operator logbook.
4 So, for example, we'll take the first one,
5 November 3rd, 2006. The bleeder valve set release
6 point was set at 95 centimeters of oil. It was in
7 the -- found inside the by-products operator
8 logbook with the beginning date of
9 August 17th, 2006, and that logbook ended on
10 January 31st of 2007. That logbook is entered as
11 Government Exhibit No. 82, and that entry will be
12 found on page 81 of that logbook within the
13 government exhibit. And the comment says "Bleeder
14 set at 95 per PC," PC being Pat Cahill, the
15 by-products manager or by-products supervisor.

16 Q. That's who you believe?

17 A. That who I believe, yes.

18 Q. Okay. I would like to go, if we could just --
19 just for example, to show the jury what we're
20 looking at for, say, December 19th, 2007, you have
21 a bleeder setting point there of 100, is that
22 right?

23 A. That is correct.

24 Q. And what is the government exhibit and page
25 number that that references?

1 A. That would be Government Exhibit 85, and that
2 would be page number 5 for that exhibit.

3 Q. Okay. If we could actually go, please, Lauren,
4 to Government Exhibit 85, page 5, which is in
5 evidence. If we could focus on this bottom
6 section.

7 Okay. So do you see that notation that you've
8 now incorporated into your summary exhibit,
9 Exhibit 200, on the screen here?

10 A. Yes, I do.

11 Q. Can you just tap it and show the jury. Okay.
12 "Bleeder now at 100 as per PC"?

13 A. Correct.

14 Q. Okay. If we could go back to Exhibit 200,
15 please.

16 So I believe your testimony was, every time
17 there was a setting change to the bleeder you noted
18 it in this log?

19 A. Yes.

20 Q. Okay. Except for one?

21 A. There was one that I -- that I missed.
22 Correct.

23 Q. Okay. There's one that did not have a set
24 point change, is that right?

25 A. Oh, yes. On 5/31 of '08, the -- that was the

1 incident where the bleeder valve was struck by
2 lightning and caused a fire. And I included that
3 in there because that has come up in -- many times
4 throughout the course of the investigation as a --
5 you know, a point of remembrance by the witnesses.

6 Q. Okay. And apparently an incident that caused a
7 little bit of concern by the operator who put that
8 in there, is that fair to say?

9 A. That would be fair to say.

10 Q. All right. So you've now noted in here all of
11 the changes to the bleeder set point from
12 Government Exhibits 82 through 89, is that correct?

13 A. That is correct.

14 Q. All right. Now, with this still up on the
15 screen, I want you to talk about these other
16 summaries. You mentioned there was another
17 category of summary documents you made?

18 A. Correct.

19 Q. Why don't you tell the jury -- first let me ask
20 you, are you familiar with Government Exhibits
21 21.01 to 21.72, 116.02.01 to 116.02.39, and
22 Exhibits 400 to 569?

23 A. Yes, I am.

24 Q. Okay. What are all of those exhibits that I
25 just gave you the numbers of?

1 A. Those are the circular bleeder valve charts
2 that were part of my analysis -- or part of my
3 summary.

4 Q. Okay. What was the earliest bleeder chart
5 summary in that group?

6 A. The earliest one is dated January 1st of 2009.

7 Q. Okay. In the course of your investigation,
8 were any earlier bleeder charts located?

9 A. No, there were not.

10 Q. Okay. So you couldn't create any type of
11 summaries for 2008, per se?

12 A. No, I could not.

13 Q. All right. So all of those bleeder charts
14 exhibits that I just gave you the exhibit numbers
15 for, did you review all of those exhibits?

16 A. Yes, I did.

17 Q. And if you can tell the jury, what, if
18 anything, did you do as you reviewed those
19 exhibits?

20 A. When I reviewed them I was looking for --
21 obviously it's a circular chart with the -- with
22 pressure notations that go in circles around the
23 chart, and that relates to the plant pressure of
24 the coke oven gas line within the by-products
25 department at the facility. I took information

1 from my first summary, which is the by-products
2 operator logbook, noted the set release point for
3 the pressure-release valve, and I looked on the
4 circular bleeder chart where the, you know, spikes
5 in the chart were in relation to the set release
6 point, and that's what I performed my summary on.

7 Q. Okay. And so did you prepare a type of summary
8 exhibit relating to these bleeder charts?

9 A. Yes, I did.

10 Q. Okay. What did you capture in those summary
11 charts relating to the bleeder circular charts?

12 A. Basically the number of releases for a 24-hour
13 period for each chart. And then I summarized
14 those, the releases, on a monthly basis over the
15 period, the course of the calendar year, with one
16 exception. We did not have bleeder -- circular
17 bleeder valve charts for the month of April, with
18 the exception of the ones during the April 2009 air
19 inspection.

20 Q. Okay. And again we went through this with
21 Mr. Cahill on the stand. Did you find any notation
22 in the by-products logbook for the April -- during
23 the April inspection time period, that noted what
24 it was being set at?

25 A. No. There were no notations in the logbook for

1 any adjustments in the release point setting for
2 the bleeder valve during the April 2009 inspection
3 dates.

4 Q. So why did you exclude April?

5 A. I excluded April because we -- a definitive set
6 point was never established with my conversations
7 with Mr. Cahill, and so I decided not -- you know,
8 the accuracy would be in question for that, for
9 that week time period, so I chose not to -- to
10 evaluate those bleeder charts.

11 Q. All right. So which months did you create
12 summary charts for?

13 A. Created summary charts for January, February,
14 March, nothing for April, May through December.
15 But with December being a short month, we only
16 had -- the last bleeder valve chart we had,
17 circular chart, was dated December 9th of 2009.

18 Q. And then the search warrant was executed on
19 December 17th?

20 A. Correct.

21 Q. All right. At this point, Special Agent, I'd
22 like to show you Government Exhibit 201 for
23 identification purposes. Do you see this document
24 on your screen?

25 A. Yes, I do.

1 Q. Just generally, what is this document?

2 A. Again, this is a summary of the releases for
3 the month of January of 2009 after I evaluated all
4 the pertinent January circular bleeder valve
5 charts.

6 Q. Did you make this document?

7 A. Yes, I did.

8 Q. How did you make this document?

9 A. Again, I took the set release point from the
10 by-products operator logbook, brought that over
11 into this document, and then I took each bleeder
12 chart and monitored the 24-hour period, any spikes
13 that went above that release point.

14 Q. Okay. And what information from the different
15 columns are on this? What information did you
16 record on this document?

17 A. I recorded the date of the circular bleeder
18 valve chart, the setting in the by-products
19 operator logbook from the first -- from
20 Exhibit 200, and then again third column is the
21 number of releases that I evaluated on that
22 circular chart in a 24-hour period. The government
23 exhibit is -- the first government exhibit, number
24 86, is the logbook entry where that set release
25 point was noted, and the page number. The second

1 government exhibit number is the actual exhibit
2 number for the circular bleeder chart that I
3 evaluated. And then the column on the right, the
4 comments, is just any -- if there were any issues
5 with the chart or if there was a section missing,
6 you know, I noted it. I tried to note it in the
7 comment section.

8 Q. Okay. So for that information you just
9 described for the jury -- the date, the setting,
10 the number of releases, the government exhibit
11 numbers, and the comments -- does Exhibit 201 here
12 that's on your screen fairly and accurately
13 summarize that information from the January of 2009
14 circular bleeder charts that you reviewed and the
15 by-products operator logbook settings?

16 A. Yes, it does.

17 MR. MANGO: Your Honor, pursuant to
18 Federal Rule of Evidence 1006, the government would
19 move Government Exhibit 201 at this point into
20 evidence.

21 MR. LINSIN: Your Honor, we would renew
22 the objection stated earlier and acknowledge the
23 Court's ruling.

24 MR. PERSONIUS: I agree, Judge.

25 THE COURT: Okay. The objections are

1 overruled for the reasons stated. Exhibit 201 is
2 received pursuant to Rule 1006.

3 (Government's Exhibit 201 was received
4 into evidence.)

5 MR. MANGO: Thank you, your Honor. I
6 would ask that Government Exhibit 201 now be
7 published for the jury.

8 THE COURT: Yes.

9 BY MR. MANGO:

10 Q. Okay. Before we zoom in on any particular date
11 here, Special Agent Conway, can you tell the jury
12 what -- what they're looking at, how this is
13 organized, please?

14 A. It's organized again by date. And again the --
15 the next column to the right is the setting for the
16 pressure-release valve, the set point on that
17 particular date. The next column again is the
18 releases on the bleeder chart that I counted that
19 went up -- that exceeded the setting in the
20 by-products operator logbook. So any -- for
21 January 1st of 2009, for example, the PRV was set
22 at a release point of 90, so when I evaluated the
23 chart, there were 48 spikes in the chart that went
24 above the pressure setting point on the bleeder
25 chart at the point -- at 90.

1 Q. All right. And then there's -- you did that
2 for each day then that you had a bleeder chart in
3 January --

4 A. Correct.

5 Q. -- is that correct?

6 A. Correct.

7 Q. Okay. And there's a calculation, it appears,
8 at the bottom?

9 A. Yes. At the end, the summary at the bottom is
10 just the number of days that were evaluated, the
11 total number of releases for that time period, and
12 then the average number of days -- or the average
13 number of releases per day over the course of that
14 month time period.

15 Q. Okay. All right. Let's start with -- do you
16 see the entry there for January 1st of 2009?

17 A. Yes.

18 Q. Okay. I'd like to have you, just for an
19 example for that one day, walk the jury through how
20 you analyzed the circular bleeder chart for
21 January 1st of 2009, which you have listed here as
22 Government Exhibit 21.01, is that right?

23 A. That is correct.

24 MR. MANGO: All right. So, at this point,
25 your Honor, I'm going to ask to put the original

1 bleeder circular chart on the Elmo system.

2 THE COURT: Yes, you may.

3 BY MR. MANGO:

4 Q. All right, Special Agent Conway, do you see the
5 Exhibit 21.01 on your screen?

6 A. Yes I do.

7 Q. All right. And why don't you walk the jury,
8 please, through -- there is a notation on the
9 left-hand side here which says midnight, is that
10 right?

11 A. That is correct.

12 Q. All right. Walk the jury through how you
13 analyzed this circular bleeder chart for
14 January 1st of 2009, again Government
15 Exhibit 21.01, which is on the screen -- how you
16 analyzed this to create Government Exhibit 201
17 which is now in evidence.

18 A. Okay. First of all, you can see the date of
19 January 1st, 2009, there at the center of the chart
20 where there's a hole just below the notation that
21 says bleeder, which tells us it's a bleeder valve
22 chart. Then you see the concentric rings with
23 readings. There is a ring for 20, 40, 60, as you
24 go from the center of the chart to my left, or to
25 the left on the chart where I've highlighted them,

1 the 20 and the 40, with a red dot. As you work
2 out, you see 80 and 100, but there isn't a mark for
3 90, but there's ring between the 80 and the 100
4 mark, and that's the 90 setting for this -- for
5 this bleeder valve circular chart.

6 Q. If you can put just an arc on the 90 line
7 somewhere?

8 A. I'm putting it a little bit below. Actually,
9 it's on the 80, because I know it's a wide line,
10 but it's that next circle to the left of my red
11 line that I just put on the exhibit. So starting
12 at midnight --

13 Q. I did that by accident. I'm sorry.

14 A. Okay. It's all right.

15 Q. Why don't we try that again. All right. Go
16 ahead.

17 A. Okay. I've established my line. It's the next
18 line over, which is the 90 setting on this circular
19 bleeder valve chart. So, beginning at midnight, I
20 would count the number of spikes -- and the spikes
21 are these red lines that you see going vertical.
22 So I would start counting. So every time that line
23 went above 90, I would count. So that would be my
24 first count, second, so on and so forth. I would
25 go around the circular chart completely for a

1 24-hour period and total up the number of spikes
2 that were above the pressure setting of 90.

3 Q. All right. And going back to Government
4 Exhibit 201, reading from that, you put 48 releases
5 on that chart?

6 A. Correct.

7 Q. And that would reference one release every half
8 hour, approximately?

9 A. Correct.

10 Q. Thank you. If we could actually go back to
11 Government Exhibit 201 at this point?

12 Would it be fair to say, then, for what you
13 just explained you did for January 1st of 2009, you
14 then continued for each of the days in January?

15 A. That is correct.

16 Q. This "missing sections" comment here, for
17 1/28/09, can you explain to the jury what that
18 means?

19 A. The by-products operator has to change these
20 charts, you know, every 24-hour period, and
21 sometimes the -- there would be sections of the
22 chart that would be missing. There would be a
23 short section where there wouldn't be pen marks.
24 And it could be because they didn't get it changed
25 in time. It could be the pen ran out of ink. It

1 could have been a number of different -- but for
2 one reason or another there was a section missing
3 where there were no pen marks on the bleeder valve
4 chart itself. So I didn't evaluate that.

5 Q. You didn't assume any type of release or
6 anything during that period of time, would you?

7 A. No, I did not assume any.

8 Q. All right. Okay. We can take that down now,
9 your Honor.

10 Let me ask you -- the questions are going to be
11 substantially the same. For February of 2009 did
12 you review the circular bleeder charts, all of the
13 bleeder charts you had for February of 2009?

14 A. I did.

15 Q. And based on your review, did you create
16 anything?

17 A. I created a summary chart of the number of
18 releases for the month of February.

19 Q. Is it fair to say that your testimony regarding
20 what you did for January of 2009, which is now in
21 evidence, Government Exhibit 201, is substantially
22 the same for what you did for February of 2009?

23 A. It is. The same information is recorded, and I
24 evaluated it in the same manner.

25 Q. All right. Let me show you for identification

1 purposes Government Exhibit 202. Do you see that
2 on your screen?

3 A. Yes, I do.

4 Q. What is this?

5 A. It's the summary of -- it's my summary that I
6 did for bleeder releases for February of 2009.

7 Q. All right. And with -- similar to the other
8 questions, does the information on here fairly and
9 accurately summarize the information contained in
10 this summary, being the date, the setting of the --
11 from the by-products logbook, the releases, the
12 government exhibit, and the comments?

13 A. Yes, it is.

14 MR. LINSIN: Your Honor, I don't mean to
15 interrupt counsel's flow, but if it would help
16 matters along, we would certainly stipulate that
17 Special Agent Conway's responses would be the same
18 to all of this series of exhibits --

19 THE COURT: February through December?

20 MR. LINSIN: February through December,
21 and noting our previous objections and
22 acknowledging the Court's rulings. However counsel
23 wants to do it, but we don't challenge the issues
24 with respect to Special Agent Conway.

25 THE COURT: Okay. Same, Mr. Personius?

1 MR. PERSONIUS: Yes, your Honor. That
2 would be through, as I understand it, Government
3 Exhibit 211, I think, is December of 2009?

4 THE COURT: Yes.

5 MR. MANGO: Yes, your Honor, with that
6 representation on the record, I would move and
7 I'll -- just so the record is clear, Government
8 Exhibit 202, which is for February of 2009 into
9 evidence; Government Exhibit 203, which is for
10 March of 2009; Government Exhibit 204, which is for
11 May of 2009; Government Exhibit 205, which is for
12 June of 2009; Government Exhibit 206, which is for
13 July of 2009; Government Exhibit 207 for August
14 of 2009; Government Exhibit 208 for September
15 of 2009; Government Exhibit 209, which is for
16 October of 2009; Government Exhibit 210, which is
17 for November of 2009; and Government Exhibit 211
18 for December of 2009, all into evidence as
19 summaries of the bleeder charts for those
20 respective months.

21 THE COURT: Okay. There's no objection to
22 what you just put on the record. They will be
23 admitted over objection, however, for the reasons
24 that we discussed previously. So Exhibits 201
25 through and including Exhibit 211 received into

1 evidence.

2 And, ladies and gentlemen, the government has
3 presented those exhibits in the form of these
4 charts and summaries prepared by Special Agent
5 Robert Conway. I'm admitting those charts and
6 summaries in place of all of the underlying
7 documents that they represent, so that that really,
8 I think, bottom line, saves time and avoids
9 unnecessary inconvenience. So from your
10 standpoint, you are to consider those charts and
11 summaries as you would any other evidence.

12 (Government's Exhibits were received into
13 evidence.)

14 MR. MANGO: Thank you, your Honor. I'd
15 like to publish Government Exhibit 202 for the jury
16 at this point.

17 BY MR. MANGO:

18 Q. All right, Special Agent, if we could focus in
19 on this section here. There's some comments on
20 here that relate to a number 1 with an asterisk.
21 Can you tell the jury what that relates to?

22 A. Yes. When I evaluated that circular chart, the
23 plant pressure for the coke oven gas line never
24 went below the set release point on the
25 pressure-release valve for a 24-hour period. So

1 when I looked at the chart the plant pressure was
2 above -- in that case for February 3rd of 2009, the
3 set release point on the pressure-relief valve was
4 90 centimeters of oil. Well, the plant pressure
5 for the coke oven gas line was above that 90 the
6 whole 24-hour period.

7 Q. All right. And in particular, there were four
8 different days that you noted that, is that right?

9 A. Correct.

10 Q. And the last date here is February 8th of 2009?

11 A. That is correct.

12 Q. All right. I'd like to show you -- do you
13 remember reviewing the bleeder circular chart for
14 February 8th of 2009?

15 A. Yes.

16 Q. Which you have noted here as Government
17 Exhibit 21.38?

18 A. Correct.

19 MR. MANGO: Your Honor, I would like to
20 put this on the Elmo system at this point, please.

21 THE COURT: Certainly.

22 BY MR. MANGO:

23 Q. All right, Special Agent, do you see Government
24 Exhibit 21.38 on the Elmo system?

25 A. Yes, I do.

1 Q. Okay. So explain again what was -- based on
2 your understanding of the by-products operator
3 logbook, what was the set point for the bleeder on
4 this day?

5 A. It was set at 90 centimeters of oil.

6 Q. Okay. And so what do you note in terms of the
7 plant pressure in relation to 90 on this chart?

8 A. The plant pressure remained above 90 throughout
9 the whole 24-hour period on this chart.

10 Q. Now, let me ask you, in terms of when you were
11 preparing all of these charts, Government
12 Exhibits 201 to 211, that's for the months, if
13 there was a -- a day that the circular chart, say,
14 was admitted into evidence, but you couldn't really
15 read it, how did you factor that into your charts?

16 A. If I didn't feel like I could evaluate the
17 chart fairly, I excluded it. There were several
18 with light pen marks. The pen wasn't keeping an
19 accurate reflection. Again, I tried to be
20 conservative in how I, you know, handled some of
21 those anomalies. So I decided not to include those
22 dates into the -- into the summary chart. So you
23 will find certain months with days missing.

24 MR. MANGO: All right. If we could go
25 back, please, your Honor, to Government

1 Exhibit 202. I'd just like to publish each of
2 these quickly for the jury.

3 BY MR. MANGO:

4 Q. So this is Government Exhibit 202, Special
5 Agent Conway. Based on your calculations, what was
6 the average number of releases per day for February
7 of 2009?

8 A. According to my summary chart, the average
9 releases per day would be 26 for the month of
10 February.

11 Q. All right. If we could go to Government
12 Exhibit 203, which is for March of 2009. Do you
13 see that?

14 A. Yes, I do.

15 Q. Okay. Based on your calculations for March
16 of 2009, what were the average number of releases
17 per day?

18 A. 48.

19 Q. If we could go to May of 2009, Government
20 Exhibit 204. Same question. What was your average
21 number of releases per day calculated at?

22 A. 57.

23 Q. Okay. So now here, if we could just note,
24 there seems to be a change from 100 to 110 that
25 occurred on May 22nd of 2009?

1 A. Correct.

2 Q. Okay. So are you saying if we then went to
3 this Exhibit 88-0021, there would be a notation
4 that the bleeder was set -- changed to 110?

5 A. There wouldn't be a notation on the bleeder
6 chart itself.

7 Q. Not on the bleed -- I misspoke. I'm sorry. In
8 the by-products operator logbook, which 88-021
9 would reference back to.

10 A. Correct.

11 Q. Okay. If we could go to Government Exhibit 205
12 for June of 2009, what was the average number of
13 releases you calculated per day for June?

14 A. For June it was 50.

15 Q. Let's go to July of 2009. Government
16 Exhibit 206. Same question.

17 A. That number would be 30.

18 Q. Let's go to August of 2009, Government
19 Exhibit 207. What did you calculate for August
20 of 2007?

21 A. For August it would be 12.

22 Q. Government Exhibit 208, which is for September
23 of 2009, what was your calculation there?

24 A. 17.

25 Q. Government Exhibit 209 for October of 2009,

1 what was your calculation there?

2 A. 48.

3 Q. Government Exhibit 210, which is for November
4 of 2009, what did you calculate as the average
5 number of releases per day for November?

6 A. 57.

7 Q. And finally, Government Exhibit 211 for
8 December of 2009, what did you calculate the
9 average number of releases per day?

10 A. 48.

11 Q. Okay. And this is your last summary chart?

12 A. Correct.

13 Q. And there was no -- again, let me just clarify.
14 There was no bleeder charts obtained past
15 December 9th of 2009?

16 A. There were no bleeder charts beyond that date.

17 MR. MANGO: Your Honor, may I have one
18 moment, please?

19 THE COURT: Certainly.

20 MR. MANGO: Nothing further for Special
21 Agent Conway, your Honor.

22 THE COURT: Okay. Do you want to break
23 for a few minutes or --

24 MR. LINSIN: It's up to you, Judge.
25 Whatever you want to do.

1 THE COURT: Do you want a break? Okay.

2 Let's take -- let's resume at 4:15.

3 (Jury excused from the courtroom.)

4 THE COURT: Okay. 4:20. That will give
5 Michelle time to run and get back.

6 (Short recess was taken.)

7 THE COURT: I think we're going to be able
8 to have argument on the Rule 29 today, so you can
9 get some sleep tonight.

10 Okay. I think your intention was to give me
11 your briefs after argument, or was it your
12 intention to give it to me before?

13 MR. LINSIN: Your Honor, we have revised
14 this document earlier this morning. We will be
15 prepared to file it electronically as soon as we
16 get back to our hotel. We don't have -- we have a
17 hard copy of an earlier version, and so we will
18 have to file electronically once we get back to the
19 hotel.

20 THE COURT: That's okay then, because
21 otherwise I wouldn't get it until tomorrow anyway.

22 MR. LINSIN: Exactly. Right.

23 THE COURT: You don't mind if I hear you
24 out today?

25 MS. GLASNER: Not at all.

1 THE COURT: Mr. Personius?

2 MR. PERSONIUS: Yes, I'm ready to go,
3 Judge.

4 MR. MANGO: Yes, we're ready, your Honor.

5 THE COURT: Okay. All right. Chris, if
6 you wouldn't mind bringing the jury in, please.

7 Mr. Conway, you're ready for cross-examination?

8 THE WITNESS: Yes, I am, your Honor.

9 (Jury seated.)

10 THE COURT: Welcome back. Please have a
11 seat.

12 Okay. All of the attorneys and parties are
13 back present. Agent Conway is back on the stand.
14 You are here, ladies and gentlemen, roll call
15 waived. And it looks like Mr. Personius is ready
16 for cross-examination.

17 Agent Conway, you remain under oath.

18 CROSS-EXAMINATION BY MR. PERSONIUS:

19 Q. Good afternoon, Agent Conway.

20 A. Good afternoon, Mr. Personius.

21 Q. With respect to the -- the summaries, the
22 monthly summaries that you prepared, the accuracy
23 of those summaries in calculating monthly releases
24 would be dependent upon the accuracy of the logbook
25 with respect to changes in the set point for the --

1 the PRV recorder. Do you agree with that?

2 A. You need to have the -- the set release point
3 document -- documented to accurately assess the
4 bleeder charts.

5 Q. And to the extent that that -- that logbook,
6 the by-product operators logbook, to the extent
7 that that doesn't record accurately every change in
8 the set point of the recorder for the PRV, your
9 summary is not going to be accurate. Do you agree?

10 A. No. During the course of my investigation, the
11 by-products operators were very definitive in
12 saying that they reflect any adjustments made to
13 the PRV release set point in those logbooks.

14 Q. And the information you're providing to us now
15 is information you obtained outside the courtroom,
16 sir?

17 A. It's information during the course of my
18 investigation.

19 Q. Outside the courtroom?

20 A. Outside the courtroom.

21 Q. Not obtained under oath.

22 A. Not obtained under oath.

23 Q. You sat here in the courtroom and you've heard
24 the testimony that's been given by the witnesses?

25 A. Correct.

1 Q. You've heard Mr. Cahill, the by-products
2 foreman, testify about the by-product operators
3 logbook, do you recall that?

4 A. I do.

5 Q. And do you recall that he testified that while
6 it might be ideal to have all the set point changes
7 recorded in the operators logbook, in practice that
8 doesn't happen?

9 A. I do not remember him stating it that way. I
10 remember him saying that the by-products operators
11 were pretty -- were diligent in putting in entries.

12 Q. Were pretty diligent?

13 A. Were diligent.

14 Q. Not pretty diligent?

15 A. Well, diligent.

16 Q. And as far as Mr. Cahill is concerned, you
17 remember he testified that he too -- and in
18 actuality he's the one that should make the changes
19 to the set point, right?

20 A. Again, that's not what I remember hearing
21 witnesses testify. There were other people that
22 have made adjustments or ordered by-products
23 operators to make adjustments to the set release
24 point.

25 Q. Let's focus on the testimony of Mr. Cahill --

1 A. Okay.

2 Q. -- and not other witnesses.

3 A. Okay.

4 Q. He was the by-products foreman for the period
5 that's covered by the indictment, true?

6 A. Correct.

7 Q. And certainly was the foreman during the 2009
8 period that you purport to summarize in these
9 exhibits, true?

10 A. Correct.

11 Q. And do you remember that he testified that one
12 of his duties is to change the set point on the
13 recorder for the PRV? Do you remember he testified
14 to that?

15 A. He could adjust it, yes.

16 Q. Not that he could. He said that was one of his
17 duties on direct examination. Do you remember
18 that?

19 A. I remember it as he sometimes changed it,
20 not -- it wasn't always him.

21 Q. And did he also testify that when he made the
22 changes he would not record them in the logbook?

23 A. My recollection of his testimony is he did not
24 change it during the April 2009 inspection. He was
25 not clear on other -- at other time periods.

1 Q. Do you remember him testifying that he would
2 make changes and they would not be recorded in that
3 logbook? Do you remember that?

4 A. As I said earlier, he stated that he did not
5 make the changes during the April 2009 inspection
6 when he adjusted the set point.

7 Q. And you don't remember the other testimony.
8 You don't remember him saying that he would make
9 changes, part of his responsibility to do so, and
10 he would not record it in the logbook, you don't
11 recall that?

12 A. I -- I don't.

13 Q. All right. Could we go to -- this is, as I
14 understand it, in evidence, Lauren. It's
15 Government Exhibit 88, which should be one of these
16 logbooks, Judge, and I have that in evidence.

17 And Government Exhibit 88 is the logbook for
18 5/10/09 to 9/26/09, is that true?

19 A. Correct.

20 Q. All right. Could we go to page 122, please.

21 Do you see that this is one of the pages of
22 this logbook? It's dated 7/30/09?

23 A. Correct. At the top of the page it does say
24 7/30/09.

25 Q. All right. And, Lauren, could you make that

1 part higher, please?

2 Do you see the -- the first note in the
3 left-hand margin?

4 A. Yes, I do.

5 Q. And do you see what it says after that? That
6 one of the operators wrote, "We do have radios and
7 a phone. If Mr. Cahill makes an adjustment on
8 anything, I believe it would be appropriate to
9 inform operators." Do you see that?

10 A. Yes, I do.

11 Q. And do you agree with me that what's being
12 referred to there is adjustments in the set point
13 for this recorder?

14 A. I don't agree with that, necessarily.

15 Q. Well, why don't you tell the jury what was
16 being referred to there.

17 A. I cannot state what -- what the referral is
18 there. I know there is a lot of charts -- during
19 the course of the search warrant there was a lot of
20 other charts seized during execution of the search
21 warrant, so there's many different things that can
22 be changed systemwise within the by-products
23 department. There's no specific reference in this
24 note about the bleeder valve adjustment.

25 Q. And if, indeed, Mr. Cahill testified during his

1 examination that he would make changes and not
2 record it, this entry would be directly consistent
3 with that, wouldn't it?

4 A. I cannot make that judgment, because I don't
5 know -- you know, I don't have a reference point
6 for what this note is stating.

7 Q. Could we go, please, Lauren, to Government
8 Exhibit 200, which is in evidence.

9 This is the summary you prepared, Agent Conway,
10 of the by-product operators logbook, correct?

11 A. Correct.

12 Q. And you have indicated to the jury that what
13 you set out in this summary is your interpretation
14 of all the entries in the by-product operators
15 logbooks as to changes in the set point for this
16 recorder, is that true?

17 A. It's not an interpretation. It's document --
18 it's documented changes of the set release point in
19 the by-products operator logbooks.

20 Q. And it did not involve any interpretation at
21 all on your part, is that what you're telling the
22 jury?

23 A. Not -- not to the -- as far as the -- the set
24 point for the pressure-release valve, no. It was
25 either -- it was in there or it was not in there.

1 Q. Okay. If we could, Lauren, please make those
2 entries bigger.

3 You have in your summary an entry for 8/29/07.
4 Do you see that?

5 A. Correct.

6 Q. And what the entry indicates is "Bleeder now at
7 80," is that right?

8 A. Correct.

9 Q. And the very next entry, which is at 10/7/07,
10 which would be about a month later --

11 A. Correct.

12 Q. -- says, "Lowered bleeder to 90 as per
13 D. Heukrath."

14 A. Correct.

15 Q. Do you agree there is an inherent inconsistency
16 there?

17 A. I agree that you can't lower a bleeder valve to
18 90 when the earlier entry states it's 80.

19 Q. So do you agree that your summary has a
20 demonstration in it that the by-product operators
21 logbook that you relied upon to create your summary
22 is incomplete regarding these set point changes?

23 A. I will admit that there is a discrepancy in the
24 entries for this time period, but there was no such
25 discrepancy in the time period for which I

1 evaluated -- did my evaluation, my summaries.

2 Q. And the period that you did your summaries for
3 was from when to when?

4 A. The period for my summaries was January 1st
5 of 2009 to December 9th of 2009.

6 Q. Okay. And could we go for a minute, Lauren,
7 please, to Government Exhibit 201 in evidence.

8 For Government Exhibit 201 in evidence, this is
9 your -- your summary of what you interpreted as
10 releases for January of 2009?

11 A. Correct.

12 Q. And you indicate consistently that the setting
13 from the BP logbook was at 90?

14 A. Correct.

15 Q. Can we go now to Government Exhibit 200 again,
16 please, Lauren. This is in evidence.

17 Show the jury, please, where you get the -- the
18 90 reading that you used for January of 2009.

19 A. The 90 set release point value is based upon
20 the September 30th, 2008, entry in my summary
21 chart. That's the last entry prior to January 1st
22 of 2009.

23 Q. All right. Could you put an arrow there? Are
24 you able to do that?

25 A. A dot or --

1 Q. Whatever you can do.

2 A. Sure. It's a little low.

3 Q. Thank you. Now, if we take these entries --
4 and make that bigger, please, Lauren.

5 The entry, Agent, that you indicated you relied
6 upon for the first period covered in your summary
7 assumes a set point of 90 based on an entry back on
8 9/30 of '08, is that true?

9 A. That is correct.

10 Q. And the comment that you take from the logbook
11 is, "Bleeder now at 90." Do you see that?

12 A. Yes, I do.

13 Q. And if we look at the next entry on 3/2/09, it
14 indicates, "Lowered bleeder to 94."

15 A. Correct.

16 Q. Do you see the inconsistency?

17 A. The bleeder valve was set at 90 in September
18 8th -- or excuse me, September 30th, 2008, and
19 there is an entry that it was lowered to 94 on the
20 2nd of March of 2009.

21 Q. So you missed at least one change in the set
22 point between September 30th of 2008 and March 2nd
23 of 2009, true?

24 A. There is -- there is obviously a set point
25 that's not listed in the logbook.

1 Q. And this time it is covered by your summaries,
2 true?

3 A. It is.

4 Q. And that covers not only January of 2009 but
5 also February of 2009, which also relies upon the
6 entry from September 30th of 2008, true?

7 A. No.

8 Q. All right. Well, let's go to Exhibit 202 in
9 evidence, please.

10 Government Exhibit 202 in evidence, in the
11 second column you reflect a set point for 90 for
12 the entire month.

13 A. Yes.

14 Q. And what was the source of the set point that
15 you relied upon for your chart?

16 A. I was still using the September 30th, 2008, set
17 point.

18 Q. Which is the one that is contradicted by the --
19 the next entry in your own chart, which says that
20 the bleeder was lowered to 94 on March 2nd of 2009,
21 true?

22 A. There is a discrepancy in the logbook, yes.

23 Q. And again it covers another month of your
24 summary, true?

25 A. I cannot -- you know, I cannot state that.

1 Q. You can't state what, sir?

2 A. You know, that I don't know what the prior
3 setting was at prior to 3/2/09.

4 Q. We know, don't we, from the entries that we
5 have, that sometime between September 30th of 2008
6 and March 2nd of 2009 that set point was changed to
7 something, at least once if not more than once, but
8 at least once, to some level that was above 94,
9 correct?

10 A. It would appear that the set point at some
11 point was above 94 at one point.

12 Q. Yes. And at some point before March 2nd
13 of 2009.

14 A. Not necessarily.

15 Q. When could it have been, sir, if it wasn't
16 before March 2nd of 2009, when it says, "Lowered
17 bleeder to 94"?

18 A. Well, the reason I state that is, when I
19 reviewed the logbooks, when they do an adjustment
20 in the set point very close together, there's
21 usually some sort of problem within the facility.
22 So it's possible that they raised the bleeder set
23 point on March 2nd and then lowered it back down.
24 Because there's several notations where there's
25 adjustments in a very short period of time when

1 there's problems in the facility.

2 Q. Are you telling us, Agent, that in interpreting
3 your summary and deciding what weight to give to
4 it, the jury should take into consideration that
5 you relied upon possibilities?

6 A. No. I relied on what the last set point was
7 for the entry, and that's how I did my evaluation.

8 Q. And didn't pay attention to the inherent
9 inconsistency in what you relied upon versus what
10 the logbook shows?

11 A. I paid attention to it. I obviously knew that
12 there were -- noted the -- the -- as you did, that
13 the bleeder valve was lowered to 94 at one point,
14 but I can't interpret -- if I start doing a lot of
15 interpretation, I'm doing things that are outside.
16 I went strictly by what was in the logbook, last
17 entry to the next entry, to keep things consistent.

18 Q. You testified, sir, about a circular chart from
19 February 8 of 2009 that showed a continuous -- if
20 you will, a continuous peak all the way around the
21 chart, do you remember that?

22 A. I remember talking about that chart, yes.

23 Q. Okay. Lauren, let's try do it with just the --
24 the screen, if we can. Government Exhibit 21.38 in
25 evidence. Well, it really isn't as good, is it?

1 First I guess we should get the date of this.

2 Could you make that larger, Lauren?

3 Do you see the date on there, Agent Conway?

4 A. Yes, I do.

5 Q. And it's 2/8/09?

6 A. Yes, it is.

7 Q. Would you put it back, Lauren, please, and then
8 do what we can, please, to make the chart itself
9 bigger.

10 It's harder to see than on the -- the original,
11 but for purposes of moving this along, do you
12 remember this was the chart where you've testified
13 that the -- what's reflected by the recorder is
14 consistent all the way around and above what you
15 understand the set point was on that date?

16 A. That is correct.

17 Q. And is it your conclusion that this means that
18 the -- the release valve was wide open for the
19 entire day?

20 A. I don't make -- I did not make any conclusion.
21 I'm just noting that the plant pressure, as noted
22 on the circular bleeder chart, consistently stayed
23 above the set point as established -- the last set
24 point as established in the logbook.

25 Q. So you don't mean to suggest to the jury that

1 that valve was wide open for 24 hours, do you?

2 A. That's -- I'm not making that suggestion. I'm
3 just saying that the plant pressure was above the
4 set point.

5 Q. And if the plant pressure was above the set
6 point, aren't you suggesting to the jury, then,
7 that the valve was open for 24 hours?

8 A. It would be a concern. Certainly, if the set
9 release point is set at 90 and the plant pressure
10 is 120, you know, there is a likelihood that that
11 pressure-release valve was emitting coke oven gas.
12 But I cannot physically -- you know, I wasn't
13 physically present to observe it.

14 Q. And you agree the jury shouldn't make its
15 determination based on what you think was a
16 likelihood, correct?

17 A. I just summarized the data to present to the
18 jury. That is not a decision I get to make.

19 Q. As part of your investigation did you determine
20 how much coke oven gas is produced in a day by
21 Tonawanda Coke?

22 A. I did not. No.

23 Q. And did you make a determination of how much
24 coke oven gas would be lost if that valve was
25 actually wide open for 24 hours?

1 A. Based upon some of the investigative data that
2 I looked at, it would be a lot of coke oven gas.

3 Q. It would be more coke oven gas than Tonawanda
4 Coke would generate in 24 hours, wouldn't it?

5 MR. MANGO: Objection, your Honor.

6 THE WITNESS: That, I could not speak to,
7 sir.

8 MR. MANGO: I'll let the answer stand.

9 BY MR. PERSONIUS:

10 Q. Now, as part of preparing -- and when did you
11 prepare these -- these summary charts? When did
12 you do this?

13 A. I've been working on them for a long time over
14 the last -- over the course of the last month.

15 Q. All right. So during the course of the trial?

16 A. Yes.

17 Q. And so the jury understands, in preparing these
18 charts, did you rely upon information outside of
19 the testimony that's been presented here at trial?

20 A. Yes, I did.

21 Q. All right. And what was the nature of that
22 outside evidence that you relied upon?

23 A. Well, when I composed the by-products operator
24 logbook summary, there were notations made in that
25 logbook related to the bleeder valve. And so as we

1 continued our investigation --

2 Q. Who's "we"?

3 A. Myself, I should say. And my colleague, Bob
4 O'Connor, if we were working in concert when we
5 were interviewing people. I would ask, you know,
6 the by-products operator who made the log entry if
7 they remembered what -- what the notes meant, so --

8 Q. Did you make a -- keep notes of those separate
9 conversations you had outside of this courtroom
10 that went into preparing this summary? Do you have
11 that information somewhere?

12 A. They would be part of my, you know, interview
13 notes for the by-products operators and, you know,
14 by-products supervisor.

15 Q. And the individuals that you spoke to that you
16 got this information from, did they all testify in
17 this trial?

18 A. No, they did not.

19 Q. So we don't have the benefit of seeing them on
20 the witness stand under oath, true?

21 A. Correct.

22 Q. Now, your -- let's go, if we could, please,
23 Lauren, to Government Exhibit 200.

24 And this, according to you, sets out, from your
25 review of these logbooks, all the instances where a

1 record was made of a change in the set point for
2 the recorder, is that true?

3 A. That was noted in the by-products operator
4 logbook.

5 Q. All right. And can we agree, getting back to
6 Mr. Cahill, that none of the entries that you've
7 identified were entries made by Mr. Cahill?

8 A. I do not recall a specific entry done by
9 Mr. Cahill. Several have noted per Pat Cahill's
10 instructions, but --

11 Q. So the jury understands, those entries were not
12 made by Mr. Cahill, were they?

13 A. They were not.

14 Q. One was made by Maurice London, and one was
15 made by Jose Ortiz, who are by-products -- or were
16 by-products operators, correct?

17 A. Correct.

18 Q. So there's not a single entry in your summary
19 of a set point change made by Mr. Cahill.

20 A. There was not.

21 Q. And yet he testified that his job -- one of his
22 job duties was to make changes to the pressure set
23 point, true?

24 A. He made -- you know, he ordered operators to
25 change the set point.

1 Q. When was the last time that that recorder was
2 calibrated?

3 A. To my knowledge through the course of talking,
4 it has never been -- it hasn't been calibrated any
5 time since it's been purchased, that anyone could
6 recall.

7 Q. Do you agree that would have an effect upon the
8 accuracy of the readings you were getting off the
9 recorder?

10 A. Again, I cannot make that call. It has not
11 been calibrated. I cannot make a determination on
12 the accuracy or inaccuracy of it.

13 Q. The reason you made the inquiry during your
14 investigation, because it was important to you to
15 know when it had been calibrated, right?

16 A. It's always good to check and see what kind of
17 maintenance a facility does on their equipment.

18 Q. Because calibration or a lack of calibration
19 would affect the accuracy of the instrument, true?

20 A. It could.

21 Q. Could we go, please, Lauren, to Government
22 Exhibit -- well, we're on 200.

23 Now, you have an entry on 2/23/08, correct?

24 A. Correct.

25 Q. And then your next entry is 5/31/08, right?

1 A. It depends on whether you were looking at the
2 2/23/08 90 or the 2/23/08 100 set release point,
3 but following that, yes, there is a May 31st entry.

4 Q. Thank you. And nothing in between?

5 A. Nothing in between.

6 Q. Lauren, could we please go to Government
7 Exhibit 85?

8 This is one of the logbooks that you reviewed?

9 A. Yes.

10 Q. Can we tell what time period this covers or no?
11 Can you tell?

12 A. Not definitively. Go to the inside of the
13 first page. It will give you the start date, at
14 least.

15 Q. Could we go to the next page, please, Lauren?

16 A. And one more page.

17 Q. Now we're on 03?

18 A. Correct.

19 Q. Can you read that or no?

20 A. It looks like it's 12/17/07.

21 Q. I think that's right.

22 Could we go to page 179 of this exhibit,
23 please.

24 And this is a -- can you read that? This is --
25 I'm sorry. Could we go to 170, Lauren. I'm sorry.

1 I misspoke.

2 Can you read what date these entries are?

3 A. It looks likes it's May 22nd of 2008.

4 Q. Okay. And, Lauren, could we please make this
5 part bigger?

6 Do you see there is an entry there that says
7 "note" in the left margin?

8 A. Yes.

9 Q. And then it says "PC raised suction"?

10 A. Correct.

11 Q. And "Lowered gas bleeder"?

12 A. Correct.

13 Q. This would be an entry that would show a change
14 in the set point, true?

15 A. Possibly.

16 Q. You don't read the entry "Lowered gas bleeder"
17 to be an indication the set point was changed for
18 the recorder?

19 A. Unless -- I mean, it could potentially be the
20 bleeder valve.

21 Q. Can we agree you missed this one in your
22 summary?

23 A. Again, I didn't miss it, from the standpoint of
24 there is no set value.

25 Q. You didn't include it in your summary?

1 A. I did not include it in my summary, no.

2 Q. Could we go, please, to -- Lauren, to
3 Exhibit 87.

4 This is another one of these logbooks, Agent
5 Conway?

6 A. Yes.

7 Q. Okay.

8 A. Sorry.

9 Q. That's okay. Can you see the date off the --
10 the face page of this?

11 A. No, you can't.

12 Q. Okay. Could we go to the next page, please,
13 Lauren, and then the page after that, please.

14 And this is page 03, Agent Conway?

15 A. Yes, it is.

16 Q. Okay. Can you read the date at the top?

17 A. Looks like it's December 31st of 2008.

18 Q. Okay. And could we go to page 115, please,
19 Lauren.

20 This -- this entry is for what date?

21 A. March 13th of 2009.

22 Q. And this would be within the -- the period
23 covered by your summary?

24 A. Correct.

25 Q. Okay. Lauren, please, if you would --

1 Do you see there's a -- a note in the left
2 margin?

3 A. Yes, I do.

4 Q. And then the entry reads, "Bleeder manometer
5 blew out 4:00 a.m., steamed out bleeder." Do you
6 see that?

7 A. Yes, I do.

8 Q. And do you know what the bleeder manometer is?

9 A. It's the device that, again, monitors the
10 pressure. The kerosene -- the oil centimeters is
11 in kerosene, is contained in that manometer, and
12 it's my understanding if the pressure release --
13 or, excuse me, the plant pressure goes above a
14 certain point, the manometer can misread; it can
15 get stuck.

16 Q. Okay. So we have an instance here where in
17 some fashion the manometer was not performing
18 properly.

19 A. Correct.

20 Q. And steps were taken to steam out the bleeder?

21 A. It would appear, yes, to steam out the valve
22 itself.

23 Q. It specifically says "Steamed out bleeder,"
24 right?

25 A. Correct.

1 Q. And we've had testimony about what that
2 involves, right?

3 A. About equipment being steamed out, correct.

4 Q. Including the pressure-relief valve, right?

5 A. In this case, obviously, steamed out the
6 bleeder.

7 Q. Okay. And did you take into consideration in
8 preparing your summary that the bleeder manometer
9 had blown out at 4:00 a.m. on March 13th of 2009?

10 A. We did consider -- consider it, yes.

11 Q. Did you put it in your summary?

12 A. I did not put it in my summary. No, I did not.

13 Q. You made a judgment that it didn't have to be
14 put in there?

15 A. Again, there's no set release point in this --
16 in this entry, so I did not include it in my chart.

17 Q. Could we go, please, Lauren, to page 191 of
18 this exhibit.

19 Can you tell us the date, please?

20 A. It's May the 6th, 2009.

21 Q. Okay. And could you make that part bigger,
22 please, Lauren?

23 And again this is from May 6th of 2009, Agent?

24 A. Yes, I believe that was the date.

25 Q. And you see the note in the left margin again?

1 A. Yes, I do.

2 Q. And this time it says, "Manometer for bleeder
3 popped blood vessel on reversal on jack. Closed
4 valve, removed stainless line. It settled down to
5 zero. Hooked back up. Seems to okay now."

6 A. Yes, I see that.

7 Q. This would be another instance where there was
8 a malfunction in this -- in this recorder, is that
9 right?

10 A. In the manometer, yes.

11 Q. Okay. You didn't include this in your summary,
12 did you?

13 A. I did not, no.

14 Q. You -- again, you made a judgment that this
15 wasn't important?

16 A. Again, as I stated before, there's no set
17 release value here, so I did not put it in my
18 summary.

19 Q. And could we, please, Lauren, go to Government
20 Exhibit 88.

21 And this is a logbook that covers a period
22 May 10 to September 26, 2009?

23 A. Correct.

24 Q. And this would be within the period of your
25 summaries?

1 A. Yes, it would be.

2 Q. Okay. Lauren, could we please go to page 21?

3 Up at the top, please, Agent, tell the jury
4 what date this is.

5 A. This is May 22nd of 2009.

6 Q. Okay. And, Lauren, could you please make that
7 bigger?

8 Do you see the -- again, Agent Conway, there's
9 a note in the left margin?

10 A. Yes, I do.

11 Q. And the entry is, "Bleeder back in service
12 11:00 a.m., 110 cm." Do you see that?

13 A. Yes, I do.

14 Q. Can we agree that that means that there was
15 some period of time -- we don't know exactly how
16 long -- that the bleeder was out of service?

17 A. There was -- it definitely notes there was a
18 problem with the bleeder, yes, and it was put back
19 in service at 11:00 a.m.

20 Q. And did you include that in your summary?

21 A. I included the 110 centimeters, yes, in my
22 summary.

23 Q. Did you include the fact that the bleeder had
24 been out of service?

25 A. Again, I have no reference on the time frame of

1 how long the bleeder was out of service.

2 Q. Let me ask my question again. Did you include
3 that information in your summary?

4 A. The note -- the comment, I believe, is in
5 there, but I did not factor that into my summary.

6 MR. PERSONIUS: Your Honor, may I have a
7 minute, please?

8 THE COURT: Sure.

9 MR. PERSONIUS: Thank you.

10 Lauren, you can take that down. Thank you.

11 Your Honor, we have nothing further.

12 THE COURT: Okay, Mr. Personius. Thank
13 you.

14 Mr. Linsin?

15 MR. LINSIN: No questions, your Honor.
16 Thank you.

17 THE COURT: Okay. Mr. Mango?

18 MR. MANGO: Yes, your Honor, thank you.

19 Brief couple of questions here.

20 REDIRECT EXAMINATION BY MR. MANGO:

21 Q. Special Agent Conway, good afternoon again.

22 A. Hello.

23 Q. Those notations that were brought to your
24 attention, had you seen those before today?

25 A. Yes.

1 Q. And you made a judgment call not to include
2 those in your summary, is that right?

3 A. I did.

4 MR. PERSONIUS: Your Honor, I object to
5 the leading.

6 THE COURT: It is leading, yes.

7 BY MR. MANGO:

8 Q. Okay. Can you tell the jury whether you
9 included those notations that were brought to your
10 attention -- whether you included those in your
11 summary or not?

12 A. For the most part I did not include them in my
13 summary, because there was no set release point --
14 change in the set release point value, with the
15 exception of the -- the last entry, which noted a
16 set point of 110 centimeters.

17 Q. Okay. And the manometer on the bleeder, if it
18 pops, do you have an understanding of whether the
19 bleeder itself is actually still in operation?

20 A. According to the -- the information that --
21 that I gathered during the course of my
22 investigation, the bleeder valve is still operable.

23 MR. MANGO: Okay. Nothing further, your
24 Honor. Thank you.

25 THE COURT: Okay. Mr. Personius?

1 MR. PERSONIUS: No, thank you, Judge.

2 THE COURT: Mr. Linsin?

3 MR. LINSIN: No, thank you, your Honor.

4 THE COURT: Okay. Agent Conway, you are
5 excused. Thank you.

6 THE WITNESS: Thank you, your Honor.

7 MR. MANGO: Your Honor, the government
8 rests.

9 THE COURT: Subject to settling of the
10 record?

11 MR. MANGO: Subject to the settling of the
12 record and any obvious rebuttal after -- if
13 necessary.

14 THE COURT: Okay. Okay. Ladies and
15 gentlemen, what you have now is what in the
16 government's view is sufficient to submit to you
17 for your determination in terms of whether it has
18 satisfied to your unanimous satisfaction by a proof
19 standard of beyond a reasonable doubt each
20 essential element of each crime charged in the 19
21 counts, under separate consideration of each
22 defendant respectively.

23 With that, and you know that the burden of
24 proof rests exclusively on the government. There's
25 no burden on the defense. The defendants are

1 presumed innocent and continue to be innocent and
2 presumed that way until proven to your satisfaction
3 otherwise beyond a reasonable doubt. No burden on
4 the defense at all.

5 What we're going to do today is gather up and
6 we're going to let you go for the evening. We're
7 going to have you come back on Wednesday, okay?
8 And on Wednesday I'll give you a little bit more
9 information in terms of whether or not there will
10 be a defense case. There's no obligation for there
11 to be one, but, we'll know a little bit more in
12 terms of just timewise what this case will consist
13 of before it will be submitted to you for your
14 consideration and reaching your unanimous verdict
15 in this case. So you get a day off. And -- all
16 right. And we'll see you on what day?

17 THE JURY: Wednesday.

18 THE COURT: Okay. At what time?

19 THE JURY: 9:30.

20 THE COURT: 9:30. Keep your minds open.
21 Don't prejudge the case. Remember, this case is
22 going to involve the application of your common
23 sense, your experience, and your intelligence to
24 resolving the fact issues, because you are about to
25 become the judges of the facts in this particular

1 case.

2 Don't go to any social media. Don't read
3 anything. Don't investigate anything. The
4 government says right now you have everything that
5 has been presented to you in the four walls of this
6 particular courtroom which should be sufficient for
7 you to make your decision.

8 There will be closing arguments in this case,
9 as well, where the attorneys will get the
10 opportunity to convince you through their advocacy
11 as to what the evidence has shown or not in this
12 particular case. So we have some things to look
13 forward to in this case in terms of whether or not
14 there may be a defense case, and certainly the
15 closing arguments in this case.

16 Anything else, Mr. Linsin, at this point?

17 MR. LINSIN: No, thank you, your Honor.

18 THE COURT: You're welcome.

19 Mr. Personius?

20 MR. PERSONIUS: No, your Honor. Thank
21 you.

22 THE COURT: Mr. Mango?

23 MR. MANGO: No, thank you, your Honor.

24 THE COURT: And Mr. Piaggione?

25 MR. PIAGGIONE: No, thank you, your Honor.

1 THE COURT: Okay. You want to go home?

2 All right. See you Wednesday. Thank you very
3 much.

4 (Jury excused from the courtroom.)

5 (Short recess was taken.)

6 (The following argument was electronically
7 recorded.)

8 THE COURT: Okay. The attorneys and
9 parties are back present. And my understanding is
10 there is to be a Rule 29 motion, and Mr. Glasner,
11 you are going to argue the motion for the defendant
12 Corporation Tonawanda Coke?

13 MR. GLASNER: That's correct.

14 THE COURT: Please, if you would.

15 MR. GLASNER: Can I proceed, your Honor?

16 THE COURT: Certainly.

17 MR. GLASNER: Good afternoon. At this
18 time Tonawanda Coke would like to move with respect
19 to all of the counts in the indictment for a
20 judgment of acquittal under Rule 29 of the Federal
21 Rules of Criminal Procedure. Mr. Personius has
22 informed me that he joins Tonawanda Coke in this
23 motion, and while he will be addressing the Court
24 as well, he joins in the arguments that I'm now
25 about to make.

1 THE COURT: All right. Has he heard those
2 arguments?

3 MR. GLASNER: He has, your Honor.

4 THE COURT: He has, okay. Thank you.

5 MR. GLASNER: With respect to Counts 11
6 through 15 and 17 through 19, your Honor, it is our
7 view that the evidence on the record is such that
8 no reasonable juror could find that the government
9 has proved all of the elements of the offense
10 beyond a reasonable doubt.

11 I'd like to focus my comments, however, on
12 Counts 1 through 5, which relate to the alleged
13 operation of the PRV, and Counts 6 through 10,
14 which relate to the quench tower number 1 at
15 Tonawanda Coke.

16 THE COURT: Okay. So 6 through 10, and --

17 MR. GLASNER: 1 through 5. And I focus my
18 arguments in the submission that would be submitted
19 to the Court after this argument on those counts as
20 well.

21 THE COURT: Okay.

22 MR. GLASNER: And the reason why I'm so
23 focused on those specific counts is because, in our
24 view, the testimony on the record with respect to
25 the issues for those categories of the counts is

1 uncontroverted, that is, there's no weighing of
2 witness credibility or balancing of contradictory
3 testimony with respect to the issues that we
4 believe make the government's offer of proof and
5 the allegations in the indictment fatally flawed
6 with respect to Counts 1 through 5 and 6 through
7 10.

8 THE COURT: All right. 6 through 10 again
9 is the western quench tower number 1 --

10 MR. GLASNER: That's correct.

11 THE COURT: -- those charges, right. And
12 then 1 through 5 is the --

13 MR. GLASNER: Operation of the pressure
14 relief valve.

15 THE COURT: Right. In terms of the COG,
16 the C-O-G.

17 MR. GLASNER: That's correct, your Honor.

18 THE COURT: Okay.

19 MR. GLASNER: So with respect to Counts 1
20 through 5, that is the operation of the pressure
21 relief valve, the allegation in the indictment is
22 that the pressure relief valve -- and I'm
23 paraphrasing here -- is an unpermitted emission
24 source -- it's an unpermitted emission source that
25 was operated in violation of condition four to

1 Tonawanda Coke's Title V operating permit.

2 And the testimony on the record by the
3 government's expert witnesses, that is Mr. Carlacci
4 and Mr. Sitzman, is that under the Title V
5 permit -- under the Title V permit application and
6 the applicable regulations, there's a distinction
7 between an emission source and an emission point.
8 And it is uncontradicted that a pressure relief
9 valve is an emission point, not an emission source.

10 If I could briefly describe the definitions of
11 what an emission point and emission source are
12 according to the testimony. According to the
13 testimony, in a Title V facility components are
14 categorized as emission units, emission sources,
15 and emission points. And as Mr. Carlacci's
16 testimony and Mr. Sitzman's testimony indicated, an
17 emission unit under Title V is most easily
18 understood as a collection of emission sources and
19 emission points, such as a boiler house or a coke
20 oven battery.

21 An emission source is a particular industrial
22 operation that produces an air pollutant in the
23 course of its operation, such as a boiler. And
24 finally, an emission point is an opening in a
25 building such as a duct, a flare, a stack, or a

1 vent through which the air pollutants generated by
2 an emission source are released.

3 Not only is the testimony uncontroverted that a
4 PRV is an emission point and not an emission
5 source, it is also on the record, and it's clear
6 from the Title V operating permit, and specifically
7 from condition four, which is the condition that's
8 alleged in the indictment that Tonawanda Coke is
9 alleged to have violated, condition four expressly
10 refers only to emission sources. And so, it does
11 not apply to the pressure relief valve.

12 THE COURT: All right. Because that's an
13 emission point.

14 MR. GLASNER: That's an emission point.

15 THE COURT: And that's -- that's the
16 argument that relates to 1 through 5?

17 MR. GLASNER: That's correct, your Honor.
18 And just to anticipate an argument that the
19 government might suggest, which is that
20 testimony -- we acknowledge that there is testimony
21 suggesting that activities -- certain activities
22 described under condition four, i.e. the
23 modification of the source applied to the pressure
24 relief valve, but it's our view that we don't even
25 get to that question. But the threshold

1 determination is whether the PRV is a point or a
2 source. And in this case it's a point, not a
3 source.

4 THE COURT: And you're saying it's
5 uncontroverted that it's a point and not a source?

6 MR. GLASNER: That's correct, your Honor.

7 THE COURT: And because the indictment
8 charges source, there's no way that the counts can
9 survive irrespective of having to view the evidence
10 in the absolute light most favorable to the
11 nonmoving party here?

12 MR. GLASNER: That's correct. And it's
13 not just in the indictment, but it's also in the
14 Title V permit, and specifically in condition four
15 only refers to a source and not to a point.

16 THE COURT: What say you?

17 MR. MANGO: Your Honor, may I have a
18 moment? I believe I have the actual definition of
19 emission source that was referenced in one of the
20 witness folders.

21 THE COURT: Okay. Well, then maybe -- you
22 want to continue? And then I'll let you get that.
23 We'll break for a few minutes. It might be easier
24 for you that way.

25 You know what you need to do maybe, Mr. Mango,

1 maybe you should focus on the next argument here as
2 well.

3 MR. MANGO: Yes.

4 THE COURT: Or have Mr. Piaggione get it,
5 that way we can keep Mr. Glasner on track as well.
6 That probably would be appreciated, I think, right?

7 MR. GLASNER: I'd be happy to continue. I
8 would note that I have a transcript of
9 Mr. Carlacci's testimony in which he defines
10 emission point and emission source, and I'd be
11 happy to go through how he defines emission point
12 and emission source, if that would be helpful to
13 the Court.

14 THE COURT: And that's controlling -- your
15 statement is that the testimony is controlling
16 irrespective of what the regulation or the permit
17 might state or define a PRV to be?

18 MR. GLASNER: That's correct.

19 THE COURT: Okay.

20 MR. GLASNER: So, your Honor, would you
21 like me to go through how Mr. Carlacci defines
22 emission point and emission source?

23 THE COURT: Well, let's do that. And I
24 think all your eggs are in that basket, right, so
25 to speak? I mean, if there's something that

1 controverts that by way of any evidence,
2 practically speaking, that would cloud the matter
3 of whether we have a source or a point or a unit as
4 far as the PRV is concerned, I'd have to view that
5 most favorably to the government in this case.

6 MR. GLASNER: That's correct. And, your
7 Honor, to be clear, having closely reviewed
8 Mr. Carlacci's testimony, at the outset of his
9 testimony he indicated that in his view a point and
10 a source can be interchangeable. However, that
11 statement was clarified on cross, and he -- and he
12 indicated that -- that is -- that definition was
13 the same under the Air 100 permits, which is the
14 regulatory regime that preceded Title V. Under
15 Title V, title -- the Title V distinguishes between
16 an emission point and an emission source.

17 THE COURT: Now that's his testimony?

18 MR. GLASNER: That's his testimony, your
19 Honor.

20 THE COURT: All right. Doesn't that
21 create a problem if he said that they're
22 interchangeable terms?

23 MR. GLASNER: But they were -- he
24 acknowledged that they were interchangeable under
25 the Air 100 permit, which again is the regime

1 preceding Title V. And he then acknowledged that
2 under Title V, they have different definitions,
3 and, in fact, he stated what those definitions are.
4 And he explained that an emission point is actually
5 the vent or pipe through which emissions are
6 released. And that the requirements are in the
7 permitting process that the height and location of
8 those emission points be identified in the permit.
9 And an emission source fit with his understanding
10 that the term "source" for the purposes of the New
11 York State permitting requirements, is an apparatus
12 or a machine that is capable of causing emission of
13 an air contaminant to the outdoor atmosphere.

14 THE COURT: To wit, a boiler.

15 MR. GLASNER: And that is not a pressure
16 relief valve.

17 THE COURT: Your example, a boiler.

18 MR. GLASNER: That's correct.

19 THE COURT: Okay. All right. Let's --

20 MR. MANGO: Your Honor, if I may just --
21 I'm ready to address that. We have a 180-degree
22 view of Mr. Carlacci's testimony. He was clear
23 when he said he considered -- you want me to keep
24 going?

25 THE COURT: Before you get to that, I mean

1 there's no issue with respect to what Counts 1
2 through 5 charge, because it does reference an
3 unpermitted emission source, does it not?

4 MR. MANGO: Absolutely. That's what the
5 Title V permit condition four addresses is an
6 unpermitted emission source. And Mr. Carlacci, in
7 his testimony, talked about -- is there a question?

8 THE COURT: Well, there is, but I'm going
9 to let you finish your statement. Go ahead. What
10 did Carlacci say?

11 MR. MANGO: He was asked specifically
12 whether he would view this bleeder, pressure
13 release valve as an emission source. And it's the
14 government's recollection of his testimony -- I
15 haven't gone through the three days of transcripts
16 which amount to over 300 and plus pages. I printed
17 them, but I did not go through them -- that the
18 pressure release valve bleeder was an emission
19 source which he did testify consistently with what
20 the definition is, is any apparatus, contrivance,
21 or machine capable of causing emission of an air
22 contaminant to the outdoor atmosphere.

23 THE COURT: I mean, is that the definition
24 of Section 4, Title V?

25 MR. MANGO: This would be the controlling

1 definition for condition four of the Title V
2 permit. And it is very clear --

3 THE COURT: Where is that located? That's
4 not the 100?

5 MR. MANGO: This is in the New York Codes
6 Rules and Regulations, Part 200, general
7 provisions, page 1, Section 200.1 is definitions.
8 And there's a definition for 200.1 sub F, which is
9 air contamination source or emission source.
10 That's where the definition comes from for emission
11 source.

12 And Mr. Carlacci was very clear that he viewed
13 the bleeder pressure release valve, as did
14 Mr. Sitzman, as an emission source, which because
15 it was not requested to be included in the Title V
16 permit, it was never brought to the DEC's attention
17 that it should be included in the Title V permit,
18 that it was unpermitted when it was being used.

19 THE COURT: As a source and not just a
20 point?

21 MR. MANGO: That's correct, your Honor.

22 THE COURT: I mean, does that testimony
23 conflict with the definition?

24 MR. MANGO: No, your Honor. I think
25 Mr. Carlacci was very consistent with the

1 definition from -- that I just read from Part 6
2 NYCRR 200.1 sub F. I believe he actually used the
3 term "apparatus" on the stand. An apparatus is a
4 valve that opens based on a pressure setting that
5 releases, as the definition is, any air contaminant
6 to the outdoor atmosphere.

7 THE COURT: Well, Mr. Glasner, do you
8 agree with that, that an apparatus is the
9 equivalent of a point and not a source -- or not
10 a -- yeah, not a source?

11 MR. GLASNER: Your Honor, if I may, unlike
12 Mr. Mango, I have the testimony of Mr. Carlacci and
13 I actually did review it. And no where did I see
14 him say that under Title V did -- is the emission
15 source -- sorry, is the pressure relief valve an
16 emission source. He was, in fact, very clear that
17 under the Air 100 permits a PRV could have been
18 considered an emission source.

19 THE COURT: What's an apparatus? Is an
20 apparatus a point, or is it a source?

21 MR. GLASNER: Your Honor, under Title V an
22 apparatus will not be a point.

23 THE COURT: It would be a source?

24 MR. GLASNER: It would be a source.

25 THE COURT: And you say that given that,

1 there's no distinction between an apparatus and a
2 PRV for purposes of point designation?

3 MR. MANGO: Yes, your Honor. I believe
4 that's what controls this analysis here, is that a
5 pressure release valve, bleeder valve used in -- as
6 the testimony we've heard, as an apparatus that
7 releases contaminants to the air constitutes an
8 emission source. And there's no question when
9 viewed in a light most favorable to the government
10 that a reasonable jury would fail to find in favor
11 of the government.

12 THE COURT: All right. So you made your
13 point on that. But really the distinction now lies
14 basically between whether an apparatus is a source
15 or whether it can be the equivalent -- but you said
16 it's a source under Title V. It's not a point for
17 purposes of our discussion.

18 MR. GLASNER: That -- under the definition
19 of Title V as Mr. Carlacci explained, a source can
20 be an apparatus, but that does not extend to a
21 valve or a vent or a duct.

22 THE COURT: Okay. Okay. All right. And
23 you say Carlacci's testimony is that an apparatus
24 and the PRV is one in the same?

25 MR. MANGO: Yes, your Honor. And my

1 recollection of Mr. Sitzman's testimony, which we
2 do not have transcribed yet, was similar in nature
3 that this pressure release valve was an emission
4 source.

5 THE COURT: Okay. All right. Where do
6 you want to go now, Mr. Glasner? Do you want to go
7 to 6 to 10, or are you going to 17 through 19?

8 MR. GLASNER: I think, as I already
9 explained, I'm going to focus on 6 through 10 next.
10 So, Counts 6 through 10 allege that Tonawanda Coke
11 operated quench tower number 1, that is the west
12 quench tower, without baffles in violation of the
13 Title V operating permit requirements. However,
14 neither the indictment nor the government in its
15 case in chief have alleged that the exemption
16 granted to Tonawanda Coke by the DEC in 1984 no
17 longer applies.

18 If you'll permit me for a moment to read from
19 the March 14th, 1984, letter granting the exemption
20 to Tonawanda Coke --

21 THE COURT: Which was what, six years
22 before --

23 MR. GLASNER: Six years before 1991 the
24 Clean Air Act was amended, but the testimony is on
25 the record already that the exemption applied at

1 the time that the Title V permit was issued. And
2 so the government has the burden of proving that at
3 some point the exemption was voided in order for
4 there to have been a violation of the Title V
5 permit, specifically condition 96 the Title V
6 permit.

7 THE COURT: Do you agree with that,
8 Mr. Mango?

9 MR. MANGO: Your Honor, we've mentioned to
10 the Court that we have accepted the position that
11 this 10 percent, especially on Mr. Sitzman's
12 testimony, when he said essentially we missed it,
13 that the 10 percent exemption -- or I'm sorry, if
14 the tower was used less than 10 percent of the
15 time, that it was permissible to use it without
16 baffles. The government has adopted that. We
17 mentioned that to the Court in this case.

18 So we are taking the stricter approach to show
19 that while it was used 10 percent or more of the
20 time without baffles. And the government believes
21 that is there is evidence from a number of
22 witnesses to testify that that tower was used
23 10 percent or more of the time.

24 But I don't believe we need to go into the
25 particulars of the letter. We agree there was an

1 exemption for use of the tower. If it was less
2 than 10 percent of the time, it did not need
3 baffles.

4 THE COURT: All right. And there was
5 evidence that it was used more than 10 percent of
6 the time.

7 MR. GLASNER: Absolutely, your Honor. And
8 we believe that the weight of the evidence will
9 show that the frequency of the usage of tower one
10 was -- first of all, that it was out of commission
11 for a period of time up to two years during the
12 relevant time period, and that it was used less
13 than 10 percent of the time when it was in use.
14 But the frequency of the usage of the tower is not
15 the question that I'm getting to or the issue that
16 I'm getting to.

17 The first issue is whether the exemption still
18 applied. And according to the 1984 letter, the
19 exemption was granted for two reasons, one, because
20 of the significant amount of expense for very
21 little reduction particulate control that
22 installing baffles would have; and two, because of
23 the intermittent use of this emission point. The
24 letter then goes on to say that conditions on the
25 operating certificate that limit the use of the

1 quench tower to less than 10 percent of the time.
2 If at a future date any of the justifications for
3 this exemption are no longer valid, compliance --
4 excuse me, compliance with 6 NYCRR Part 214.3 may
5 then be required.

6 It's not -- it does not say that it shall be
7 required. It's not saying that if the cost issue
8 is resolved, or if the frequency of the usage of
9 the baffles changes, then automatically baffles
10 will be required. It says it may be required. And
11 there's been no evidence in the government's case
12 in chief that the DEC ever made a determination
13 that the exemption was voided.

14 In fact, it is our view that this is a
15 necessary element that the Court has to prove, and
16 it should have been included in the indictment,
17 because otherwise there's no violation.

18 THE COURT: There was no exemption
19 viability?

20 MR. GLASNER: Exactly.

21 MR. MANGO: Your Honor, the testimony as I
22 recall it from Mr. Carlacci and Mr. Sitzman were
23 both at one point the Regional Air Pollution
24 Control Engineers for all of the New York -- for
25 all of Region 9 of New York State was that this

1 exemption was voided if the tower was used
2 10 percent or more of the time.

3 So, in essence, we have established that
4 through their testimony. We don't need to have it
5 written in writing that, you know, DEC is now
6 voiding this exemption.

7 THE COURT: It's virtually voided by
8 operation of law in a sense.

9 MR. MANGO: Yes, your Honor.

10 THE COURT: Why not? I mean, I think that
11 was the testimony, right?

12 MR. GLASNER: But, your Honor, the --
13 well, the testimony was that the exemption was in
14 place when the Title V permit was issued.

15 THE COURT: Okay.

16 MR. GLASNER: And again, there was no
17 determination by the DEC or notification to
18 Tonawanda Coke that the exemption no longer
19 applied. And it seems to me that this letter,
20 which is in evidence as Exhibit 19.17, is the
21 controlling document which governs how the
22 exemption should have been applied.

23 THE COURT: Yeah, but the testimony was
24 that with usage above 10 percent, the exemption was
25 voided.

1 MR. GLASNER: But -- well -- but according
2 to the letter, again that was not -- there has
3 been --

4 THE COURT: Is that the '84 letter you're
5 referring to?

6 MR. GLASNER: It is, your Honor.

7 THE COURT: All right.

8 MR. GLASNER: There had to have been some
9 kind of notification or determination to Tonawanda
10 Coke, otherwise how else would Tonawanda Coke have
11 been able to -- would have known that there was no
12 longer an exemption that applied? According to
13 this letter, if Tonawanda Coke operated the towers
14 more than 10 percent, the exemption could very well
15 still have been in place. So the testimony that
16 the towers were used -- the quench tower one was
17 used more than 10 percent.

18 THE COURT: And that goes back to your
19 language about the "may" versus the "shall".

20 MR. GLASNER: That's correct, your Honor.

21 MR. MANGO: Your Honor, if we want to talk
22 in the abstract, title -- draft Title V permit gets
23 issued. It has the condition which says
24 100 percent of the time you have to have baffles in
25 this tower. Tonawanda Coke doesn't comment on

1 that. The Title V permit gets issued, which says
2 100 percent of the time you have to have baffles in
3 the tower.

4 The Title V permit gets all the way out
5 to 2007. Tonawanda Coke applies for a renewal
6 permit. And so if we want to talk about in
7 abstract what happened, the government would argue
8 that by the very essence of the Title V permit,
9 they were put on notice that they needed to have
10 baffles.

11 Now, we've adopted the position which is
12 reasonable in light of the two head chiefs of the
13 air department who testified that there was this
14 exemption. So the testimony is controlling that
15 they viewed this exemption voided based on a
16 reasonable interpretation of that letter if the
17 tower was used 10 percent or more of the time.

18 THE COURT: Baffles may be required.

19 MR. MANGO: That is correct.

20 THE COURT: Not shall. How were they to
21 know?

22 MR. MANGO: That -- I think you need to
23 then look at the Title V permit, which says they
24 shall be required. Condition 96, which relates to
25 those towers, says you operate a wet quench tower,

1 baffles shall be required.

2 THE COURT: Okay. So you have to leap
3 from the exemption to the Title V language because
4 there's really no intervening process that puts
5 Tonawanda Coke on notice that they have to change
6 from the exemption that they were under the
7 impression they had?

8 MR. MANGO: That's correct, your Honor.
9 I'd like to actually review -- I believe there was
10 some additional documents that were submitted
11 relating to this. I know the 1984 letter that was
12 sent was the final indication from the department.
13 But I'd like to just take a moment maybe on a break
14 or at a second just to look at that quickly. But
15 then we also need to use that with the west quench
16 tower in context of the eastern quench tower, which
17 we do have correspondence between the intervening
18 time period of '84 and the Title V permit, which is
19 another notice which says explicitly a wet --
20 you're reminded, a wet quench tower has to have
21 baffles.

22 THE COURT: Yeah, but the east quench
23 tower doesn't have any relevance really to what's
24 charged in 6 through 10.

25 MR. MANGO: Right.

1 THE COURT: Okay.

2 MR. MANGO: And I would just note for the
3 record that that 1984 memo or letter puts the onus
4 on Tonawanda Coke Corporation. They're the ones
5 who need to identify if we're using this tower
6 10 percent or more of the time, then they -- they
7 have a burden. We've gone through that with two
8 witnesses in terms of the whole permitting
9 structure under the Clean Air Act and Title V. The
10 burden rests with the facility.

11 THE COURT: To what, notify?

12 MR. MANGO: To notify if that condition is
13 not appropriate.

14 MR. GLASNER: Your Honor, the -- Tonawanda
15 Coke included in its Title V permit application
16 reference to the exemption. And the issue is not
17 whether Tonawanda Coke notified the DEC of the
18 usage of the baffles -- excuse me, of the quench
19 tower or whether the cost in relation to the value
20 of the baffles had changed. The issue is that
21 there was never a determination made, and the
22 government hasn't proven it, hasn't alleged it in
23 its indictment, and based on what Mr. Mango is
24 saying now, it sounds like he's constructively
25 amending the indictment to include an allegation

1 that the exemption no longer applied.

2 I mean, that to me is the issue. No where in
3 this letter does it say that you have to notify us
4 of the -- if the change occurs. It says if at a
5 future date any of the justifications are no longer
6 valid, compliance with the regulation may then be
7 required.

8 THE COURT: How does that burden shift to
9 Tonawanda Coke to notify?

10 MR. MANGO: Your Honor, the permitting
11 scheme is such that the corporation has the burden
12 to notify of a change of use. The DEC can't be
13 expected to be on site monitoring or with
14 binoculars how frequently this west quench tower is
15 being used. That's not reasonable. That is not
16 reasonable under the Clean Air Act as established
17 through the testimony, which facilities have the
18 obligation to notify of modifications of use, if
19 new sources come in online that need a permit. And
20 it was -- it would be the government's argument
21 that the corporation had that burden, that once
22 10 percent or more usage of that tower occurred,
23 the burden shifted to the -- to the facility.

24 THE COURT: Yeah, because irrespective of
25 inspections, periodic or otherwise, it would be

1 highly unlikely that that could be determined by
2 the government, whether it's the DEC or EPA or
3 whatever, right?

4 MR. MANGO: Yes, your Honor. And as we
5 heard, inspections are really a snapshot of one
6 given time. And they can't make it an assessment
7 of percentage of use from one inspection.

8 THE COURT: Okay. Okay. Mr. Glasner, I
9 guess we go through 17 through 19, RCRA.

10 MR. GLASNER: I'm not going to have any
11 elaborate comments on Counts 17 through 19 other
12 than to note that based on the evidence in the
13 record, it's our view that no reasonable juror
14 could -- could find that the government has proven
15 its case beyond a reasonable doubt.

16 I just want to say one thing last thing with
17 respect to Counts 6 through 10.

18 THE COURT: Sure.

19 MR. GLASNER: And that is -- I guess two
20 quick points. One is that the testimony on the
21 record is that it was -- that in order to apply and
22 be granted an exemption, the application had to be
23 made in writing and the granting of the exemption
24 had to be made in writing.

25 THE COURT: Okay. And you had to make the

1 application in order to have it granted.

2 MR. GLASNER: Exactly. And Tonawanda Coke
3 acted consistent with that. It submitted a letter
4 requesting an exemption, and that exemption was
5 granted in 1984. So it did everything that it was
6 supposed to do.

7 THE COURT: Except that circumstances
8 changed. It emitted more than 10 percent.

9 MR. GLASNER: But there's been --

10 THE COURT: Arguably.

11 MR. GLASNER: Arguably. Again, we don't
12 believe that the weight of the evidence --

13 THE COURT: Or quench.

14 MR. GLASNER: But there's been no evidence
15 stating that the burden of notification shifted to
16 Tonawanda Coke when -- if things changed. And
17 there's nothing in the letter that says that. So,
18 again --

19 THE COURT: But practically speaking, how
20 would EPA or DEC know if Tonawanda Coke didn't
21 advise them that the circumstances that mandate the
22 installation of baffles have changed? How would
23 they know that?

24 MR. GLASNER: Well, your Honor, the DEC
25 was well aware of this exemption.

1 THE COURT: Yeah, I mean, in '84.

2 MR. GLASNER: Exactly. Not only in '84,
3 but pursuant to the Title V permit application. I
4 mean, Tonawanda Coke stated specifically that it
5 was operating quench tower number one pursuant to
6 that exemption.

7 THE COURT: But they didn't say that they
8 were operating it more than 10 percent of the time,
9 right?

10 MR. GLASNER: They did not. But, the --
11 the exemption letter does not say that Tonawanda
12 Coke needed to notify the DEC of that. And the DEC
13 had every opportunity as well to determine that
14 through its regular inspections and through its
15 review of the Title V permit application. And the
16 testimony from the DEC expert witnesses is that
17 after their review of the application, it was a
18 mistake not to include the exemption in the Title V
19 permit.

20 THE COURT: Well, how do I resolve the
21 issue of who has the burden on this for purposes of
22 Count 6 through 10?

23 MR. GLASNER: According to this letter,
24 your Honor, it's clear that the burden is on the
25 DEC to -- because it's not compulsory that

1 Tonawanda Coke will have to have baffles in quench
2 tower number one even if -- even if circumstances
3 change. So, that suggests very clearly that the
4 burden is on the DEC to notify Tonawanda Coke when
5 baffles are required.

6 MR. MANGO: I disagree, your Honor.
7 Viewed in a light most favorable to the government,
8 the two experts who testified talked about the
9 requirements of a facility under the Clean Air Act.
10 The original letter that was sent in 1983 -- this
11 is Exhibit 19.02 -- Tonawanda Coke states with
12 explicit reference, "Number one quench tower is
13 used as a backup unit, and as such, in service only
14 intermittently, i.e., about 10 percent of the
15 time." That statement, in conjunction with the
16 1984 letter, memorandum outlining this agreement,
17 in conjunction with the whole regulatory scheme
18 under the Clean Air Act as testified by our two
19 experts and viewed in a light most favorable to the
20 government, I think the burden -- when viewed in
21 those terms, there is -- the viewing of that needs
22 to swing towards the government, your Honor, and
23 the burden would be on the facility.

24 MR. LINSIN: Your Honor, may I ask leave
25 of Court to supplement the points here on just this

1 one narrow issue? Setting aside for a moment this
2 issue of the regulatory exemption and its validity
3 and who has the burden, the problem with the
4 government's position as we see it, and their
5 emphasis on this percentage of use and whether it
6 voided an exemption that had been granted, the very
7 articulation of that issue, we submit, makes it
8 clear that the counts in the indictment fail to
9 allege what they are now acknowledging is an
10 essential element of their proof.

11 There is nothing, nothing, not a single word in
12 Counts 6 through 10 that this quench tower number
13 one, the west quench tower, was used more than
14 10 percent of the time. It is significant, your
15 Honor, that there has been so much testimony about
16 this issue, so much controversy with the witnesses,
17 and not a whisper in the allegations in the
18 indictment in 6 through 10.

19 And we've struggled with this on just how in
20 the world we would fashion a jury charge for 6
21 through 10 given this assumption of burden that
22 Mr. Mango has acknowledged, but without any
23 allegation in this indictment. And my -- our
24 concern about these five counts is that the
25 government has adjusted its theory on these five

1 violations post-indictment, has recognized oh, wait
2 a minute, we had this earlier exemption, we can
3 prove the tower was used more than 10 percent of
4 the time. But that was not the allegation or
5 charge presented to and returned by the grand jury.

6 We are living with the four corners of Count 6
7 through 10, and there is nothing in there that says
8 anything about percentage of usage or voiding of an
9 exemption.

10 THE COURT: And that's what you say is
11 fatal, that there's no reference to a voiding of
12 the exemption, and you can't sustain the counts
13 without addressing that.

14 MR. LINSIN: Well, we believe that both
15 the issues are, your Honor. We believe that the
16 absence of this allegation in the counts is fatal.
17 But we also believe that the testimony -- kind of
18 the post-hoc testimony of the witnesses at time of
19 trial essentially saying well, we would have voided
20 this exemption had we known X, Y, or Z, we don't
21 believe that that really relates to the
22 contemporaneous validity of this exemption during
23 the time period of the indictment.

24 THE COURT: Well, doesn't -- then it
25 fundamentally goes to whether you can consider

1 these cases -- these counts as proper in light of
2 the confusion with respect to the exemption.

3 MR. LINSIN: Well, your Honor, yes, we
4 believe that both of these issues demonstrate that
5 these counts are fatally flawed. The failure to
6 allege anything about percentage of usage or
7 anything about the exemption or the voiding of this
8 exemption, coupled with the uncontradicted
9 testimony of the government's witnesses, we think
10 the government essentially has acknowledged, yes,
11 there is an element here that wasn't alleged.
12 We're prepared to prove it, but the problem is they
13 didn't charge it.

14 THE COURT: Okay.

15 MR. MANGO: Your Honor, we disagree with
16 that assessment. That the Counts 6 through 10
17 count -- or charge violations of condition 96 of
18 the Title V permit. There's been testimony that in
19 view of the regulatory history condition 96
20 included this exemption.

21 THE COURT: Yeah. So the charge is that
22 the defendants violated Tonawanda Coke's Title V
23 permit by operating the quench tower without a
24 baffle system.

25 MR. MANGO: Right, but in parentheses,

1 condition 96 of the Tonawanda Coke Corporation's
2 Title V permit, which would then incorporate this
3 10 percent or more -- voiding of the exemption if
4 it was used 10 percent or more of the time.

5 THE COURT: Isn't that sufficient notice
6 if that's what it says? I don't have it here,
7 but --

8 MR. LINSIN: Your Honor, condition 96 of
9 the Title V permit says nothing about this
10 exemption, not a word, and certainly nothing about
11 10 percent usage. The conditions of this exemption
12 are contained only in the 1984 letter. As the --
13 as the government's witnesses have acknowledged,
14 they missed this exemption when the permit and
15 permit condition 96 was drafted and issued. So,
16 permit condition 96 by its language doesn't
17 incorporate anything about the exemption.

18 THE COURT: So the whole should-have,
19 could-have, would-have stuff is irrelevant to the
20 prosecution here for purposes of maintaining the
21 viability of Counts 6 through 10.

22 MR. LINSIN: The government's witnesses
23 have acknowledged that the exemption was still
24 valid at the time the permit was issued. The
25 government and its witnesses are now contending,

1 kind of after the fact, well, had we known this,
2 that, or the other, we would have voided the
3 exemption, and that may well be the case. And I
4 understand that gets into a weighing of evidence.
5 But that's not the point here.

6 We live with the counts that are charged -- the
7 language charged in Counts 6 through 10. There's
8 nothing about this exemption, nothing about
9 percentage of the usage, or the voiding of the
10 exemption.

11 MR. MANGO: But there is in the testimony
12 of the witnesses, and the government believes
13 that's sufficient, your Honor.

14 THE COURT: All right. Well, let me take
15 a look at it in terms of the face of the indictment
16 is what you're looking at -- looking to in terms of
17 how I decide the viability of 6 through 10.

18 MR. LINSIN: I think the government is
19 bound by that, your Honor. And, yes, we believe
20 that to be correct.

21 THE COURT: Okay. And then I know your
22 argument then on 17 through 19.

23 MR. GLASNER: Yes. And I would just add
24 that Mr. Personius now is going to address
25 Count 16, and we join in his argument with respect

1 to Count 16.

2 THE COURT: I noticed you elbowed
3 Mr. Linsin out there when he was trying to get back
4 to the microphone.

5 Was there something that you wanted to say?

6 MR. LINSIN: Oh, no. I overstayed my
7 welcome.

8 THE COURT: Okay.

9 MR. GLASNER: Thank you, your Honor.

10 THE COURT: Okay, Mr. Glasner. I
11 appreciate it. Okay. You've countered all those
12 parts. You need a little time to look for that one
13 document I think or something, but --

14 MR. MANGO: I believe we're -- I put our
15 comments on the record, your Honor. As we get back
16 to and evaluate the submission of the defendants,
17 if there's additional written submission, the
18 government can add to clarify or highlight my
19 arguments, we may do so.

20 THE COURT: Okay. Well, then that leaves
21 us with 16, and that's, I think, your argument,
22 Mr. Personius?

23 MR. PERSONIUS: It is.

24 THE COURT: Okay. Now, we're talking
25 obstruction?

1 MR. PERSONIUS: Yes. Your Honor, I think
2 it's always good practice if you can with a jury
3 and with the Court to try to summarize up front
4 exactly what the argument is. And our argument
5 here, Judge, is -- it's a -- it's simple to state,
6 and we think that it's clear under the law, that
7 the section under which Mr. Kamholz is charged,
8 which is 18 U.S.C., Section 1505, which deals with
9 obstruction regarding an agency matter proceeding
10 requires that at the time of the obstructive
11 conduct that the proceeding be pending. And we, in
12 the submission that's going to be submitted, and
13 that's the language, your Honor, of the count,
14 that's the language of the statute, and that's what
15 the case law holds, and that's the essence of our
16 argument.

17 You know, because you listened so well, you
18 know what the evidence is. You know that the
19 evidence from Mr. Cahill is that the conversation
20 that he's testified about, that we have to assume
21 for purposes of this argument occurred, what was
22 said was said. We have to assume for purposes of
23 this argument that a reasonable juror could
24 conclude that Mr. Kamholz, when he made those
25 remarks, had a bad criminal intent, that he

1 intended to obstruct. But that conversation was on
2 a Friday. That conversation was on April 14th, at
3 the latest, and the proceeding, the inspection did
4 not start until four days later on April 14th
5 [sic], of 2009.

6 Now, the way the charge is set out in the
7 indictment, Judge, in Count 16 supports that
8 conclusion, because if I may, I'll briefly
9 summarize it. It says that "Mr. Kamholz did
10 corruptly obstruct" -- and I'm quoting from
11 Count 16 -- "the due and proper administration of
12 the law under which a pending proceeding was being
13 had before the United States Environmental
14 Protection Agency by instructing that Tonawanda
15 Coke employee to conceal, during an EPA inspection,
16 the pressure relief valve was emitting coke oven
17 gas to the atmosphere." So --

18 THE COURT: They said in April 2009,
19 right? Doesn't that read that way?

20 MR. PERSONIUS: No. What the allegation
21 says at the beginning, Judge, is that it was from
22 on or about April 14th to April 21st. And the
23 complained-of conduct, according to the testimony,
24 occurred at the very latest, on April 10th.

25 THE COURT: It doesn't say directed the

1 employee in April of 2009, that's not there?

2 MR. PERSONIUS: I see the count. I'm
3 looking at paragraph 57 of Count 16 as saying that
4 the conduct reportedly occurred between April 14
5 and April 21st.

6 THE COURT: Yeah.

7 MR. PERSONIUS: And I don't see the
8 reference. I don't think it matters, but I don't
9 see any reference in there to during April of 2009.
10 I see it as being specifically those dates. We had
11 an interest, Judge, during the discovery phase of
12 this proceeding in pinpointing what the proceeding
13 was. We thought it was clear from the count, but
14 we wanted to make sure, and Mr. Mango was kind
15 enough to provide us with a voluntary
16 particularization letter in which he specifically
17 acknowledged the following.

18 This is part of our submission, Judge, so
19 you'll get a copy of this. But on April 27th,
20 2011, in a response to this request for voluntary
21 particularization, Mr. Mango confirmed the
22 following: "We identified the proceeding as the
23 joint inspection by the Environmental Protection
24 Agency and the New York State Department of
25 Environmental Conservation that was conducted from

1 April 14-21, 2009."

2 And, your Honor, the -- this element of a
3 pending proceeding is specifically set forth in
4 Section 1505, which provides, in part, that the
5 proceeding -- it says that "the obstructive conduct
6 must have an effect on the due and proper
7 administration of the law under which any pending"
8 -- and I underscore the word "pending" -- "is" --
9 and I underscore the word is -- "being had before
10 any department or agency of the United States."

11 The cases and specifically U.S. versus
12 Quattrone, which we again cite in our submission,
13 Judge, it's a Second Circuit case, recognized that
14 in making this determination on -- or making a
15 determination on what the elements of a Section
16 1505 charge are, that you can apply cases that are
17 decided under the companion statute, which is
18 Section 1503.

19 1503 is similar to 1505, except 1503 deals with
20 obstruction of judicial proceedings. But the
21 Quattrone case specifically recognizes, Judge, and
22 it's in footnote 18 of that decision, that the
23 analysis is the same under either statute.

24 The reason that that's important is that here,
25 Judge, there's more jurisprudence on this under

1 1503 than there is under 1505. And the Second
2 Circuit has held, Judge, in two different cases,
3 and they're cited again in our papers. One is U.S.
4 versus Capo, C-A-P-O, and then that was reaffirmed
5 in U.S. versus Biaggi, B-I-A-G-G-I, that a
6 proceeding has to be pending at the time of the
7 offensive conduct, or you don't have a violation of
8 this statute.

9 Now, the best case we could find both in terms
10 of a factually analogous circumstance and that has
11 a good discussion of what the law is in this area
12 happens to be a District of Columbia district court
13 case that's called U.S. versus Smith. And again,
14 we cite that in our submission.

15 What's significant about Smith is, Judge, that
16 in part it cites Capo, the Second Circuit decision,
17 as support for its holding. And the facts in Smith
18 revealed that there was a police officer. He was
19 involved in enforcing the drug laws. And the
20 suspicion of the police department where he worked
21 was that he was shaking down drug dealers, and he
22 would stop the drug dealer, and while he might
23 arrest the drug dealer, he would either steal drugs
24 or money from the drug dealer before processing the
25 suspect, or he'd let the suspect go. In other

1 words, he was engaging in bad behavior.

2 The police department undertook a sting
3 operation, and as a result of that they
4 successfully caught the officer engaging in this
5 activity. And one of the charges that they brought
6 against that officer was a violation of Section
7 1503. In other words, he was obstructing judicial
8 proceedings.

9 The police officer's argument in response
10 was -- his lawyer's argument was, wait a minute,
11 this may be wrongful conduct, but it doesn't
12 violate a Section 1503, because there was no
13 judicial proceeding. There was no criminal
14 complaint filed at that time. There was no grand
15 jury investigation pending. There was no
16 proceeding under the statute pending at the time
17 the officer engaged in the offense or the activity
18 that was charged against him in the indictment.

19 And the District of Columbia district court
20 that considered that case held that that's
21 absolutely true, and that there's no such thing as
22 an immanency theory under Section 1503.

23 And our argument is there isn't under 1505, and
24 while this might be a result that doesn't taste
25 good to the mouth, that is what the law is. The

1 statute is very clear on it. We think the cases
2 are very clear on it. We think it's clear here,
3 Judge, that the proceeding we're dealing with is
4 this inspection that did not start until
5 April 14th, the latest the alleged activity was,
6 was April the 10th.

7 And what also reaffirms, Judge, that this is,
8 if you will, it's a problem with the statute is
9 that Congress later, just to deal with the paper
10 destruction side of this problem, enacted Section
11 1519 of Title 18 in 2002. In our submission in a
12 footnote we reference the legislative history when
13 Section 1519 was enacted, and there's comments in
14 there by Senator Leahy from Vermont and then
15 Attorney General Chertoff, that specifically note
16 that the reason 1519 was enacted was to address
17 this problem, that under Sections 1503 and 1505 the
18 proceeding had to be -- I think the word used is
19 "under way" at the time the conduct occurred.

20 And as I say, it may be an outcome that, from a
21 practical perspective doesn't make sense, but we
22 interpret the case law, including Second Circuit
23 case law in Capo and Biaggi, and the factual
24 illustration from the Smith case and the District
25 of Columbia district court as supporting this

1 position.

2 THE COURT: What's the April 10th date
3 that you mentioned?

4 MR. PERSONIUS: That -- I'm sorry, Judge,
5 I should be clear about that. That's the date that
6 Mr. Cahill testified that he had the conversation
7 with Mr. Kamholz. In other words, that was, if you
8 will, that was the offending conduct. That's when
9 Mr. Kamholz reportedly said when the pressure
10 relief valve went off, "we can't have that going
11 off" -- either "we can't it going off" or "we can't
12 have it going off when they're here." In other
13 words, that's what the government alleges was the
14 obstruction. And I'm repeating myself, but it was
15 before the proceeding was pending.

16 THE COURT: Okay. Thank you. Mr. Mango.

17 MR. MANGO: Yes, your Honor. Thank you.
18 There are two responses the government has to that
19 argument. First, if you remember the testimony of
20 Miss Hamre and the testimony of Mr. -- or
21 Investigator O'Connor, there was certain records
22 sent to the Tonawanda Coke Corporation and
23 specifically Defendant Kamholz. And I hold in my
24 hand Government Exhibit 117.13, which is a letter
25 sent to the Tonawanda Coke Corporation on

1 April 8th, which would have been Wednesday, saying
2 we're going to inspect you. Get your documents
3 ready. The proceeding has started on --

4 THE COURT: Is that Hamre's letter?

5 MR. MANGO: This was Hamre's letter that
6 she was involved in sending. So, your Honor, the
7 proceeding was very much under way at the time that
8 Pat Cahill received the instructions "We can't let
9 that go off while they're here." He said
10 specifically, "while they're here." So he's
11 referencing this proceeding that is now under way,
12 which is EPA is going to be coming to our plant.
13 Get your records ready. And so that is in one
14 response.

15 The other response, your Honor, is that the
16 count also charges that Mr. Cahill -- or this
17 conduct was committed not only through 1505, but
18 also through 18 U.S.C. 2, which is aiding and
19 abetting. So, the argument the government would
20 make is in addition to the argument that the
21 proceeding was really pending and started on
22 April 8th when Mr. Kamholz was emailed the letter
23 on April 8th, according to Miss Hamre, that an
24 inspection was coming up, that in addition to that,
25 based on the aiding and abetting statute,

1 Mr. Kamholz committed this crime through the use of
2 Pat Cahill, which occurred during the inspection.

3 So, the key, your Honor, is there was
4 correspondence with the Tonawanda Coke Corporation
5 prior to. EPA inspection was underway at that
6 point. Once you receive a letter from the EPA
7 saying we're coming to inspect your facility and
8 here are the records you should start gathering,
9 that inspection -- that proceeding has started.

10 THE COURT: Yeah, but Section 2 doesn't
11 wash unless you have a pending proceeding as well,
12 right?

13 MR. MANGO: Correct, your Honor. So
14 when -- as charged in the indictment, which is from
15 on or about April 14th to on or about April 21st,
16 the defendant did corruptly influence, obstruct,
17 and impede and endeavor to impede and obstruct, and
18 all that language, that carries over from every day
19 that Pat Cahill went in the morning of and changed
20 the pressure release setting, that's based on the
21 instructions that he was given.

22 THE COURT: Well, for purposes of this
23 argument, you're saying that the investigation
24 commenced with the issuance of that Hamre letter on
25 April 8th.

1 MR. MANGO: That is part of the argument,
2 yes, your Honor. But, in the event the Court does
3 not agree that the investigation commenced on
4 April 8th, which I'll look for case law, and if we
5 can find case law that supports that a letter being
6 sent commences proceeding, I'll inform the Court.
7 But even if not, Judge, the time period of April
8 14th to April 21st is the critical time period.
9 And that is the time period that Pat Cahill, based
10 on his testimony, every day of the inspection,
11 which we know was April 14th to April 21st adjusted
12 the pressure release valve. And he did that
13 because he had instructions by Defendant Kamholz.

14 THE COURT: To head off the investigation
15 so to speak.

16 MR. MANGO: Right. So in essence, if
17 those instructions were given before the
18 commencement of the proceeding, those instructions
19 carried over into the proceeding when Pat Cahill
20 acted on those instructions.

21 THE COURT: That's similar to the
22 background with respect to a conspiracy charge.

23 MR. MANGO: Yes, your Honor.

24 THE COURT: Okay.

25 MR. PERSONIUS: That's -- the problem with

1 that argument, Judge, it isn't charged as a
2 conspiracy, which might have been a good idea to do
3 that. And the indictment specifically says that
4 the operative conduct by Mr. Kamholz was the
5 obstruction. It doesn't allege that it was any
6 later conduct undertaken by Mr. Cahill. And the
7 government's voluntary particularization letter
8 again, they specifically indicate the proceeding is
9 not an investigation, and that's key. It was the
10 inspection, and it was the inspection that occurred
11 between April 14th and April 21st.

12 What the government is arguing here, Judge, is
13 exactly what this statute doesn't permit, which is
14 this -- the concept that's sometimes used, Judge,
15 is called anticipatory obstruction, and that is not
16 permitted under this statute. And what it's called
17 in the Smith decision is that the government wants
18 to argue an imminency theory. Well, you know
19 something's about to happen, but under this
20 statute, the proceeding has to pending at the time
21 the offensive behavior takes place.

22 THE COURT: Yeah, but, really, I think the
23 government's argument is that the investigation
24 technically is pending once notice is given with
25 respect to scheduling. So that's your cutoff

1 point. Once notice is issued, you're saying,
2 right, that the investigation is ongoing?

3 MR. MANGO: Yes, your Honor.

4 MR. PERSONIUS: And we're saying -- we
5 don't dispute, Judge, that letter was sent. But
6 what we're saying, Judge, under the case authority
7 for this section, that isn't good enough, because
8 that's this concept of anticipatory obstruction.
9 And again, it's not that there was an
10 investigation. It was an inspection. And the
11 government has specifically indicated that
12 inspection did not start until April 14th.

13 THE COURT: Well, whether it's an
14 inspection or -- or not, or something else, is that
15 sufficient to be a pending proceeding?

16 MR. PERSONIUS: The inspection qualifies,
17 there's no question. There's I think a Ninth
18 Circuit called Technique I think is the case.
19 We've looked at it, Judge. And an inspection is
20 good enough to trigger this statute. But the
21 inspection didn't start. It wasn't pending.

22 THE COURT: Unless the letter scheduling
23 it triggers the pending nature of the proceeding.

24 MR. PERSONIUS: And we don't think it
25 does, because then we think you're slipping into

1 this anticipatory behavior, which is not allowed
2 under the statute.

3 I know it makes you uncomfortable. It seems
4 illogical. But that's how we read the law.

5 THE COURT: Okay.

6 MR. PERSONIUS: And it will be in the
7 brief, and we well understand the government may
8 want to respond to that.

9 THE COURT: Well, you'll have a lot of
10 time this evening to do that, Mr. Mango.

11 MR. MANGO: All night, your Honor.

12 THE COURT: Well, you know, whatever you
13 can get to us. I mean, I'd like to have your input
14 on it.

15 MR. MANGO: Absolutely.

16 THE COURT: And we'll try to get it
17 decided tomorrow.

18 MR. PERSONIUS: Great.

19 THE COURT: Okay.

20 MR. PERSONIUS: Thank you, Judge.

21 THE COURT: Thank you all very much. I
22 appreciate you staying.

23 MR. LINSIN: Thank you, your Honor.

24 THE COURT: You're welcome.

25 * * * * * *

CERTIFICATION

I certify that the foregoing is a
correct transcription, to the best of my
ability, from the electronic sound recording
of the proceedings in this matter.

s/Michelle L. McLaughlin
Michelle L. McLaughlin, RPR
Official Reporter
U.S.D.C., W.D.N.Y.